86-71 (8)

No.

IN THE

Supreme Court of the United States

October Term, 1986

CTS CORPORATION,

Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT OF APPELLANT CTS CORPORATION

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United States Court of Appeals

For the Seventh Circuit

Nos. 86-1601, 86-1608

DYNAMICS CORPORATION OF AMERICA,

Plaintiff-Appellee, Counterdefendant-Appellee,

v.

CTS CORPORATION,

Defendant-Appellant, Counterplaintiff-Appellant.

STATE OF INDIANA,

Intervenor-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 1624—**Susan Getzendanner**, *Judge.*

ARGUED AND DECIDED APRIL 23, 1986—OPINION MAY 28, 1986
AMENDED JUNE 9, 1986

Before BAUER, CUDAHY, and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* On March 10 of this year Dynamics Corporation of America, which already owned 9.6 percent of the common stock of CTS Corporation, made a tender offer for another million shares. The offer if accepted would bring its stock holdings up to 27.5 percent of the company. On the same day, Dynamics filed this suit in the federal district court in Chicago; as later amended, the suit sought to enjoin the enforcement of Indiana's statute regulating takeovers, on the ground that

the statute violates the supremacy and commerce clauses of the federal Constitution. When CTS "opted in" to a new Indiana statute on the subject, the Control Share Acquisition Chapter as it is called, Ind. Code §§ 23-1-42-1 *et seq.*, Dynamics further amended its complaint to challenge the new statute on the same grounds. A pendent count in the complaint sought to enjoin CTS from enforcing a recently adopted shareholders' rights plan ("poison pill"), on the ground that it violated the fiduciary obligations of CTS's management toward its shareholders. CTS counterclaimed against Dynamics, seeking an injunction against the tender offer on the grounds that it would result in a violation of section 8 of the Clayton Act, 15 U.S.C. § 19 (interlocking directorates), and that it failed to disclose material information. There are some individual parties, but as they are not important to the legal issues we shall ignore them.

Both Dynamics and CTS moved for preliminary injunctions. After a month of frantic pretrial discovery a one-day evidentiary hearing was held before the district judge, who in a series of orders then ruled that the poison pill plan violated Indiana law, that the Indiana statute violated both the supremacy and commerce clauses of the federal Constitution, and that CTS was not entitled to a preliminary injunction. She therefore granted the preliminary injunction requested by Dynamics. CTS, joined by the Attorney General of Indiana, who has intervened in the case to defend his state's statute, appeals under 28 U.S.C. § 1292 (a)(1), which allows an immediate appeal from an order granting or denying a preliminary injunction. We accelerated our consideration of the appeal because Dynamics had only till April 24 to decide whether to buy the shares tendered in response to its offer. We heard argument on April 23 and later that day affirmed the district judge's orders, with a notation that an opinion explaining the grounds of our decision would follow.

The main issues we must address are the lawfulness of CTS's poison pill scheme, the district court's compliance with a federal statute requiring that a state's attorney general be notified that the constitutionality of a statute

of his state is being challenged, the constitutionality of the new Indiana takeover statute under the supremacy clause and also under the commerce clause, the significance of the potential violation of the Clayton Act, and the adequacy of the disclosures made in the tender offer.

Before taking up these issues we shall comment briefly on the procedural posture of the case in this court, an appeal from orders granting and denying requests for preliminary injunctions. As emphasized in our recent opinions, in different but compatible formulations, the task for a district judge asked to grant a preliminary injunction is to compare the irreparable harm to the plaintiff if the injunction is denied, weighted by the likelihood that the denial would be erroneous because the plaintiff will prevail in the plenary trial, with the irreparable harm to the defendant if the injunction is granted, weighted by the likelihood that the grant would be erroneous because the defendant, not the plaintiff, will prevail in the trial. See *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433-34 (7th Cir. 1986); *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986); *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387-88 (7th Cir. 1984). So, for example, the greater the probability that the plaintiff will win the case in the end, the less irreparable harm he need show relative to the defendant in order to get the preliminary injunction. If both parties are likely to suffer the same amount of irreparable harm, so far as estimation is possible, then likelihood of success becomes decisive. See *American Hospital Supply Corp. v. Hospital Products Ltd., supra*, 780 F.2d at 598. That seems a reasonable description of the present case; the fact that both parties sought preliminary injunctions does not affect the analysis.

If the tender offer is blocked, Dynamics will lose an opportunity that may never recur. The present owners of shares in CTS who have tendered them to Dynamics may lose, too, but their loss is easily quantified—it is the difference between the price in the tender offer and the price to which CTS stock falls. The only problem is uncer-

tainty as to how many shares Dynamics would actually have bought if its offer was oversubscribed, as it was. But, conversely, if the tender offer is not blocked, CTS's shareholders will be irrevocably harmed if, as CTS predicts, they are stampeded into selling their shares to Dynamics for a lower price than the shares would eventually command if the tender offer were defeated, or if shareholders who do not tender are coerced into surrendering their shares later at inadequate prices in a "back-end" deal engineered by a board of directors that Dynamics is expected to control if its tender offer succeeds. The harms are very difficult to quantify and it seems best to treat them as offsetting. Hence Dynamics is entitled to the relief it sought (including the denial of the preliminary injunction sought by CTS) if but only if it is more likely than CTS to prevail at a full trial, in the unlikely event that one is ever held.

When the only issue on appeal from an order granting or denying a request for a preliminary injunction is likelihood of success, the role of the appellate court is little different from that in an appeal from a final judgment. Review of the district judge's legal rulings is plenary, review of the judge's findings of fact limited to clear errors. Since the complex, particularistic, often intuitive process of weighing likelihood of success against the balance of irreparable harms is not involved when that balance is assumed to be even, the deference that we give the district judge's striking of that balance is not a factor in this appeal.

Against this background we first ask whether the district court was right to conclude that the adoption of the poison pill violated the fiduciary obligations of CTS's management to its shareholders. The parties agree both that the question is governed by the common law of Indiana and that Indiana takes its cues in matters of corporation law from the Delaware courts, which are more experienced in such matters since such a large fraction of major corporations is incorporated in Delaware and such a small fraction in Indiana.

The whole issue of permissible defensive tactics in the face of a tender offer is immensely contentious, and it is no business of ours, whose duty on this branch of the appeal is only to predict how the Indiana courts would evaluate CTS's poison pill maneuver, to choose sides. There are two polar positions in the debate. One views hostile takeovers as a bad thing, on a variety of grounds such as that they make managers of companies that are potential targets of takeover bids worry too much about short-term financial results and that they promote absentee ownership and control. See, e.g., Scherer, *Takeovers: Present and Future Dangers*, Brookings Rev. (winter-spring 1986), at 15; Herman, Corporate Control, Corporate Power 100-01 (1981). Whether or not Dynamics ever merges CTS into it, the parties seem agreed that if the tender offer succeeds, Dynamics, as by far the largest shareholder of CTS, will probably be able to elect a majority of the board of directors. Dynamics is a New York corporation with headquarters in Connecticut, CTS an Indiana corporation with headquarters in Indiana. The record is not clear on where the firms' assets and employees are concentrated, and indeed reveals little about the companies except that CTS is a manufacturer of electronic and electromechanical components and Dynamics a diversified manufacturer of consumer and industrial products and that both are large companies whose stock is traded on the New York Stock Exchange.

The other pole is that all resistance to takeover attempts is bad. See, e.g., Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981); Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 Stan. L. Rev. 819 (1981); cf. SEC Office of Chief Economist, *A Study on the Economics of Poison Pills*, Fed. Sec. L. Rep. (CCH) ¶ 83,971 (March 5, 1986). The market price of publicly traded stock impounds all available information about the value of the stock, and anyone who offers a higher price (Dynamics' tender offer price was $43, and when the of-

fer was made CTS's stock was trading at $36) thereby offers an unequivocal benefit to the shareholders of the target firm, which management if it is really a fiduciary of the shareholders should embrace rather than oppose. In that way the market for corporate control will be kept fluid and corporate assets will be transferred, with a minimum of friction, to those who value them the most, as measured by the prices they offer. See also Ginsburg & Robinson, *The Case Against Federal Intervention in the Market for Corporate Control*, Brookings Rev. (winter-spring 1986), at 9.

It is a safe prediction that the Indiana courts would reject the polar views, as the Delaware courts have done. To allow management to use its control of the board of directors to frustrate all hostile takeovers would nullify an important protection for shareholders. The threat of hostile takeover plays a vital role in keeping management on its toes. CTS has been a troubled firm of late; a major acquisition (which Dynamics, long a major shareholder, opposed) soured, and was written off at a large loss. If CTS's management is allowed to insulate the company from any change of control to which management does not agree, the shareholders may be unable to realize the potential value of their investment. Maybe under different control, specifically Dynamics' control, CTS would be a more valuable company; then its shareholders would benefit from a takeover, hostile or otherwise. It is only human for CTS's officers and directors to doubt that a company which, if it takes control of CTS, will fire them can actually do a better job of running "their" company. But it is not their company; at least it is not supposed to be. It is supposed to be the shareholders' company, for it is they who are entitled to all the income that the company generates after paying off all contractually or otherwise obligated expenses. The officers and directors are the agents and fiduciaries of the shareholders and owe a duty of complete loyalty which is inconsistent with erecting insuperable barriers to hostile takeovers.

But it does not follow that loyalty requires passivity. See, e.g., Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 Harv. L. Rev. 1028 (1982). If someone stops you on the street and says, "Say, that's a beautiful watch you're wearing—I'll give you $250 for it," you won't necessarily agree to the sale even if the watch is worth only $100 to you (apart from any sale value it may have). You may want to see whether you can sell it for even more than $250, now that you have an inkling of what its market value may be. Likewise the first tender offer may not be the best. It is true that each shareholder can decide for himself whether he is likely to do better by holding out for a better offer, and if enough decide this way the offer will fail and maybe the offeror, or some other investor, will offer more. But many shareholders are passive investors. They know little about the companies in which they invest or about the market for corporate control. They want to be told whether they should sell their shares now or wait for a better offer to come along. Better yet—for it is difficult to absorb information about a subject you don't know much about—they want management to create a process that will maximize the value of their shares in a takeover situation. That may require the use of some defensive tactics.

One defensive tactic that is permitted and indeed required by federal law is, as we shall see, to have a cooling off period between the announcement and the consummation of a tender offer. Such a period gives the shareholders time to do some shopping around. This is not an unmixed blessing. It reduces the expected gain to the first maker of a tender offer, for now he may have to compete with other offerors and may have to raise his price—a possibility that will reduce the likelihood of a tender offer's being made in the first place. On the other hand, the waiting period creates an opportunity for other investors to make competing offers, and thus encourages an auction of the firm's assets with more than one bidder. Maybe the second effect dominates the first. To take another example, if a corporation offers its key managers "golden para-

chutes" (generous severance pay in the event they lose their jobs because of a takeover), this may make them resist takeovers less; and the benefits to shareholders may exceed the costs of the golden parachutes themselves as well as the effect of the parachutes in making the takeover more costly to the acquiring firm.

Conceivably even the "poison pill" may, if it is not actually lethal, benefit shareholders of the target firm. This wonderfully vivid term refers to a family of shareholder rights agreements which, upon some triggering event such as the acquisition by a tender offeror of a certain percentage of the target corporation's common stock, entitle the remaining shareholders to receive additional shares of common stock (or other securities) at bargain prices. Suppose that the tender offeror makes an offer for 51 percent of the stock of the target firm, knowing that if the offer succeeds he can then force out the minority shareholders by voting his shares for a swap of the target's assets for cash (a cash merger). Although minority shareholders who are squeezed out in this fashion have a legal right to receive the fair value of their shares, that value may be less than either the tender offer price or the value that their shares would command in the market had there been no tender offer. A poison pill triggered by the acquisition of a majority stock interest gives the remaining shareholders more shares. This both improves their position if the tender offer succeeds and makes all shareholders less frantic to tender. Without the poison pill, shareholders will compete to tender their shares because if they do not they may miss out on an opportunity to sell their shares at a premium price and thus to escape the fate of the minority shareholder. But at the same time, by making a tender offer less certain to succeed and more costly to the offeror, the poison pill may reduce the number of tender offers and the price of each offer, thus hurting all shareholders ex ante.

The tradeoffs obviously are complex, so it is no surprise to find that the evidence on whether particular defensive tactics enhance or reduce shareholder welfare is mixed.

See Jensen & Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. Financial Econ. 5, 29-40 (1983). An intriguing recent finding is that targets that resist tender offers yet are later acquired do better, at least in the short run, in maximizing shareholder wealth than targets that do not resist. The qualification is vital; if, as seems likely, defensive tactics reduce the number of tender offers, then shareholders may lose in the long run. Moreover, the study finds that if the target resists so stubbornly that it is not acquired later, its shareholders are made unequivocally worse off. See Jarrell, *The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merge?*, 28 J. Law & Econ. 151 (1985). But maybe, even with the risk that resistance will be too successful or that defensive tactics may eventually weaken the market for corporate control and hurt all shareholders, some resistance is the optimal strategy for managements perfectly loyal to their shareholders to follow. If so, the adoption of some defensive measures, perhaps even some poison pills, may be in the interest of all the corporation's shareholders, though we are not aware of any rigorous study which finds that poison pills help shareholders.

Personally we are rather skeptical about the arguments for defensive measures. They strike us as giving too little weight to the effect of "defensive" measures in rendering shareholders defenseless against their own managements. (The shareholders of CTS were not asked to approve the poison pill.) We are especially skeptical about the arguments used to defend poison pills. If the present case is representative, the poison pill seems (as we shall see) more a reflex device of a management determined to hold on to power at all costs than a considered measure for maximizing shareholder wealth. Unlike a fair price amendment, which requires the tender offeror to pay the same price to the nontendering as to the tendering shareholders in order to head off a stampede to tender that may reduce the price of the tender offer, the poison pill can (in this case did) substantially dilute the tender offeror's shares, thereby defeating the object of the offer, which is to take

over the company in the hope of squeezing more profit out of its assets. Depending on its terms the poison pill may also make each shareholder think himself better off not tendering, hoping instead to get the goodies that nontendering shareholders receive by virtue of the poison pill. But of course if no one tenders, no tender offer can succeed.

So we have grave doubts about poison pills. But our personal views on a matter committed to the authority of the states are not terribly important; and given the complexity of the issue it is understandable why state courts would hesitate to condemn all defensive measures (even all poison pills) as breaches of fiduciary duty, on the basis of the present incomplete evidence of the actual effects of these measures.

Indeed, the Delaware courts have been quite emphatic that defensive measures in general and poison pills in particular are within the power of the board of directors of a target corporation. E.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986). But at the same time these courts have insisted that the measures be plausibly related to the goal of stockholder wealth maximization. See *id.* ("when a board implements anti-takeover measures, . . . [the] potential for conflict [of interest] places upon the directors the burden of proving that they had reasonable grounds for believing there was a danger to corporate policy and effectiveness, a burden satisfied by a showing of good faith and reasonable investigation"); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1356 (Del. 1985) ("when the business judgment rule applies to adoption of a defensive mechanism, the initial burden [of proving that the directors acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company] will lie with the directors"); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("Because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls

for judicial examination at the threshold before the protections of the business judgment rule may be conferred"). The shifting of burdens adopted in these decisions was anticipated by Judge Cudahy's dissenting opinion in *Panter v. Marshall Field & Co.*, 646 F.2d 271, 299-304 (7th Cir. 1981). See also *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 273 (2d Cir. 1986) (dictum).

Thus the Delaware courts have not, as CTS argues, written targets' management a blank check endorsed with "business judgment rule." This rule expresses a sensible policy of judicial noninterference with business decisions made in circumstances free from serious conflicts of interest between management, which makes the decisions, and the corporation's shareholders. Not only do businessmen know more about business than judges do, but competition in the product and labor markets and in the market for corporate control provides sufficient punishment for businessmen who commit more than their share of business mistakes. When however there is a serious conflict of interest, and in particular when management is making decisions that may thwart the operation of the market in corporate control, the judicial role (under Delaware law, and we assume Indiana law as well) is less deferential. When managers are busy erecting obstacles to the taking over of the corporation by an investor who is likely to fire them if the takeover attempt succeeds, they have a clear conflict of interest, and it is not cured by vesting the power of decision in a board of directors in which insiders are a minority (five of CTS's eight directors are outsiders). No one likes to be fired, whether he is just a director or also an officer. The so-called outsiders moreover are often friends of the insiders. And since they spend only part of their time on the affairs of the corporation, their knowledge of those affairs is much less than that of the insiders, to whom they are likely therefore to defer.

These problems have seemed serious enough to warrant a more searching judicial review of corporate decisions concerning defensive measures to takeovers than of deci-

sions concerning ordinary business decisions. Such review is not without its costs. It makes directors overcautious, makes people reluctant to serve as directors, drives up directors' fees and officers' and directors' liability insurance rates, and leads boards of directors to adopt ponderous, court-like procedures. But the price is one the courts have been willing to pay.

From these general reflections we turn at last to the particulars of this case. Since the present management of CTS took over the company in 1981, a year after Dynamics first became a major shareholder, CTS's rate of return has declined substantially, in part because of a series of acquisitions to which Dynamics objected and which indeed turned out to be flops. Dynamics therefore coupled its March 10 announcement of the tender offer with a declaration that it would field a slate of candidates for the board of directors election scheduled for April 24 (since postponed). On the very same day (March 10, which was also the day this lawsuit was filed) CTS's management announced its opposition to Dynamics' actions—without having studied their business and financial implications or even having consulted CTS's outside directors. The next day CTS retained as its investment advisor Smith Barney under a contract whereby the advisor would receive a bonus if Dynamics lost the proxy fight. The following day the board met to discuss the matter. Without consulting the board, CTS's chairman wrote the shareholders the next day urging them not to vote for Dynamics' slate. On March 22 Smith Barney presented its poison pill proposal to the board, with an accompanying "fairness opinion" in which it opined that Dynamics' tender offer was unfair but did not opine on whether the $43 price in the offer was fair or unfair. The board did not discuss price either, but did at that very meeting unanimously adopt the poison pill.

The tender offer was not evaluated in a cool, dispassionate, and thorough fashion. We do not mean to suggest that the board was obliged to accord due process to Dynamics; we have no desire to judicialize board of direc-

tors meetings. But it is apparent that the insiders on the board, in particular the chairman, decided from the start to block the tender offer, before its ramifications for shareholder welfare were considered; judgment first, trial later, as the Queen of Hearts said in *Alice in Wonderland*. Smith Barney held itself out as a blocker, and would have lost its $75,000 bonus if it had advised the board that the tender offer was fair and if the end result of this advice had been Dynamics' wresting control of the board from the existing directors. How the fairness of the tender offer could be determined without any consideration of the fairness of the offer price is mystifying. CTS argues that not all the shareholders could get the tender offer price, because Dynamics was seeking tenders of only 17.9 percent of the shares. This is doubly misleading. Every fifth shareholder (.179 divided by .904—the other 9.6 percent of the shares being owned by Dynamics already—is .198) would get that price. More important, all the shareholders benefited ex ante. Upon announcement of the tender offer the price of CTS stock rose from below $36 to above $40 (a much bigger percentage leap than the NYSE Composite, S&P 500, or Dow Jones indexes took that day). Those shareholders who did not expect to be in the lucky one-fifth to sell to Dynamics at $43 could sell the day the offer was announced for $40. (Of course some stockholders would not have known about the movement in the price and some who did know would adhere to a buy-and-hold strategy, and so not sell.) It is worth noting that the price of CTS shares dropped substantially the day after the poison pill was announced, and rose again when the district judge's order invalidating the poison pill was released.

CTS argues that it did not need to investigate the tender offer in order to know it was bad, for there was a long history of bad blood between it and Dynamics. Dynamics had been a very restive, unhappy shareholder. There had been litigation between the companies. CTS's management had formed the judgment that the companies had incompatible philosophies, with CTS focusing on the

long term and hence making substantial capital investments and Dynamics going for the quick buck. It *knew* a takeover of CTS by Dynamics would be bad. But given CTS's disappointing performance in recent years and the fact that Dynamics seemed to have been vindicated in its opposition to CTS's acquisitions by CTS's having written off the largest one as a loss, CTS's management could not be so confident that a takeover by Dynamics would reduce shareholder wealth. The friction between the companies required, if anything, more than the usual amount of care by CTS's board of directors in evaluating the proposal, to make sure that personal feelings would not be allowed to interfere with the board's fiduciary obligations.

All this might be of little moment if the particular poison pill which Smith Barney sold CTS's board were a plausible measure for maximizing shareholder wealth, for as we have said we have no desire to force boards of directors into a judicialized mode of proceeding and we recognize the time pressure under which the board was operating, with the stockholders' meeting scheduled for April 24 and the starting gun for selling stock to Dynamics in response to its tender offer due to go off only 28 days after the announcement of the offer. So let us look at the terms of the poison pill. As soon as one shareholder had 15 percent or more of CTS's stock, all the others would get the right to buy a securities package, consisting of stock and a debenture, for 25 percent of the then market price of the package. The right would thus be triggered if the tender offer went through, and presumably would be exercised since the terms are so advantageous to the shareholder (illustrating our earlier point that poison pills discourage acceptance of tender offers). Assuming that all rights were exercised, the effect of the additional shares that would be issued to the existing shareholders would be to reduce Dynamics' holdings from 27.5 percent of CTS's common stock to 20.7 percent. Not only would this reduce Dynamics' voting power in the election for the board of directors but it would inflict a substantial capital loss on Dynamics. CTS would

be worth no more just because, the "poison pill" having taken effect, the company had more shares outstanding than it did previously. Therefore 20.7 percent of the company would be worth less than the 27.5 percent Dynamics thought it was getting: $24 million less, assuming a $40 price for CTS shares.

In addition, the total amount of debentures to be issued to the shareholders as part of the poison pill would burden CTS with a new, long-term fixed debt of $80 million at a high interest rate (13 percent), further reducing the value of Dynamics' holdings. This large debt, for which CTS would not receive commensurate value in exchange, would reduce CTS's net profits. It could, indeed, imperil its financial health very seriously; for the taking on of such a large debt would entitle some existing creditors of CTS to treat CTS as having thereby defaulted on their loans to it, and these creditors would therefore be entitled to call the loans—and the whole house of cards might collapse. At the very least, the new debt would increase the volatility of CTS's earnings by increasing the fraction of fixed costs in the company's financial structure. This in turn would reduce the value of the stock quite apart from the effect of lower earnings, simply because most investors are risk averse. See, e.g., Lorie & Hamilton, The Stock Market: Theories and Evidence, chs. 11-12 (1973).

We do not want to paint too bleak a picture. Unless the debentures so weighted down CTS with debt that they forced the company into bankruptcy, the shareholders—other than Dynamics, of course—would be getting something of value out of the transaction: the debentures. Their investment in CTS would be converted from an all-equity investment to a package consisting of a riskier equity investment and a debt investment. Indeed, putting aside the effect on Dynamics, the immediate effect of issuing the debentures would just be to raise CTS's debt-equity ratio; and if the ratio was too low before, the shareholders might be made better off. But there is no indication that it was too low before; and if a company's debt-equity ratio is too high, the risk of bankruptcy may become very great.

All this *Sturm und Drang* seems a high price to pay for fending off a change of corporate control that may, for all that appears, benefit the shareholders greatly, though it will be a humiliation to the present officers and directors. It is defended as necessary to protect minority shareholders from a disadvantageous "back-end" transaction. But even after Dynamics obtains 27.5 percent of CTS's stock, it will not be a majority shareholder, and will therefore not be able to squeeze out the remaining shareholders. To be able to do that it will have to buy up another 22.5-plus percent of the shares. CTS's poison pill is thus to be administered prematurely. If the rationale is to protect minority shareholders, it should be triggered by a transaction that creates a majority shareholder or that attempts to squeeze out the minority shareholders, and it should give the minority the same price per share as the majority—not a higher price calculated to kill off the tender, indeed to kill off any tender. CTS's shareholder rights agreement is triggered much earlier, and at a higher price. It effectively precludes a hostile takeover, and thus allows management to take the shareholders hostage. To buy CTS, you must buy out its management.

CTS argues that once Dynamics controls the board of directors and hence the proxy machinery, it will be able to gull the remaining shareholders into selling their shares to it for too low a price. Setting aside the legal remedies against abuse of the proxy machinery, CTS's argument if correct underscores the importance of not impeding tender offers too much, since the premise of the argument is that management cannot be trusted to protect the interests of the shareholders.

We conclude that the poison pill was properly enjoined, and move on to the cluster of issues concerning the distinct takeover obstacle erected by the Indiana control-share acquisition statute, which if valid would thwart Dynamics' tender offer. The Attorney General of Indiana argues that the district judge violated 28 U.S.C. § 2403(b), which provides that in a federal court action in which the

constitutionality of a state statute "affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality." On April 9 the district judge, who had not yet certified to the state's attorney general that the constitutionality of the Indiana takeover statute was being challenged, held that the statute violated the supremacy clause, because in conflict with the Williams Act. There is a question whether section 2403(b) is meant to apply to cases where the only constitutional challenge is under the supremacy clause, that is, where the state statute is contended to be in conflict with a federal statute. The argument against requiring certification in such a case is that preemption may leave the state statute in force in most of its domain, as in our recent decision in *National Metalcrafters v. McNeil*, 784 F.2d 817, 828-29 (7th Cir. 1986). Whatever the actual force of the argument, the State of Indiana appears to concede the point, for it makes no complaint about the fact that the challenge based on the supremacy clause was not certified to it. On April 16, however, the district judge issued another order, this one holding that the takeover statute also violated the commerce clause; there is no dispute that certification is required in such a case. She did certify—but on April 16, and with oral argument in this court scheduled for April 23 we gave the attorney general only till April 19 to file a brief in this court. He argues that this was not enough time and that at a minimum the April 16 order should be vacated.

Section 2403(b) does not say when the certification must be issued. The suit was not filed till March 10, the constitutional issues did not surface till the complaint was amended on March 31, and ordinarily a delay of less than three weeks in certifying the existence of a constitutional challenge would not be undue. But this was not an ordinary case; and to issue the certification simultaneously with the decision does not comport with the spirit of a statute designed to give the attorney general a fair op-

portunity to argue and if necessary present evidence (only argument is at issue here) to save a state statute. Argument after decision—argument that asks the district court to reconsider its decision or us to reverse it—is an inferior substitute for argument before the district court's decision, which is what the statute obviously envisages though it does not require it in so many words.

Some cases, illustrated by *Bridges v. Phillips Petroleum Co.*, 733 F.2d 1153, 1156 n. 7 (5th Cir. 1984) (per curiam), seem to regard belated certification (e.g., at the appellate level) as adequate compliance nonetheless. A closely related line of cases in the Second Circuit deems it adequate compliance to allow the state to file a brief on appeal without worrying about any formalities of certification. See, e.g., *Doyle v. Suffolk County*, 786 F.2d 523, 526 (2d Cir. 1986). Still other cases, illustrated by *Merrill v. Town of Addison*, 763 F.2d 80, 82-83 (2d Cir. 1985), and by our own decision in *Kealey Pharmacy & Home Care Services, Inc. v. Walgreen Co.*, 761 F.2d 345, 350 n. 8 (7th Cir. 1985), emphasize that failure to comply with section 2403(b) does not deprive the district court of jurisdiction, so that the district court's decision need not be vacated just because certification was belated. In none of the cases we have found, however, did the appellate court hold the challenged state statute unconstitutional, so the issue of the district court's failure to comply with section 2403(b) was not momentous.

In any event section 2403(b) does not prescribe a sanction for its violation; that is left to the courts. And in this case it seems to us the proper sanction (assuming the statute really was violated) is no sanction. The violation was inadvertent, reflecting the very rapid course of the litigation in the district court. The prejudice to the state seems to be nil, for it has yet even to suggest what arguments it might make that counsel for CTS has not made, and it does not want to present any evidence. And the state's apparent lack of interest in challenging the district judge's conclusion that the statute violates the supremacy clause is inconsistent with its passionate interest in challenging her conclusion that the statute also

violates the commerce clause. As we said earlier, a finding of preemption may merely curtail the application of the statute—but not in this case. The district judge held that the only provision of the statute that is in issue is invalid in its entirety under the supremacy clause. This consequence the state contemplates with apparent equanimity; why should it insist on timely certification of a challenge that has the same effect—namely, lethal?

Two other threshold challenges to the district court's constitutional rulings need not detain us for long. The state argues that venue was improper in the Northern District of Illinois; the case should have been brought in Indiana. But objections to venue can be waived, and were waived here by CTS when it failed to follow up its initial objection to laying venue in Illinois. CTS argues that the district court should have abstained in favor of the state courts of Indiana, which might have given a saving construction to the Indiana statute. See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983). Lack of time is one objection to this course, but the decisive objection is that although there is an issue of state law in this case that affects the constitutional question—whether the Indiana statute is limited to cases where the target corporation is incorporated in Indiana—we have resolved that issue in favor of the state, for we agree that the statute is so limited.

We come then to the merits of the constitutional issues. The issue under the supremacy clause is, as we have said, whether Indiana's control-share acquisition statute is preempted by the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f). The Indiana statute allows a corporation that has more than 100 shareholders and is incorporated in Indiana, and that has its principal place of business, principal office, or substantial assets there, and ten percent of whose shareholders, or 10,000 of whose shareholders, or owners of ten percent of whose shares, reside there, to elect to be covered by the "control share acquisition" provisions of the act; CTS elected. A control share ac-

quisition is defined as an acquisition that along with any previous acquisitions gives the acquirer at least 20 percent of the voting stock of the covered firm. If the acquirer files a statement containing specified information about his intentions and financial capacity (similar to the information required by the Williams Act), management has 50 days within which to hold a special shareholders' meeting to consider whether the acquirer shall have voting rights. A decision in favor of awarding voting rights requires a majority both of all shares and of all "disinterested" shares, that is to say, shares of all shareholders except the acquirer and the officers and inside directors of the corporation. Without these two majorities, the acquirer's shares remain nonvoting shares. If the acquirer does not request a special meeting the question of voting rights will be taken up at the next regularly scheduled stockholders' meeting. And if no acquiring-person's statement is filed the corporation can redeem the acquirer's shares "at the fair value thereof pursuant to the procedures adopted by the corporation."

Cleverly drafted though the statute is to skirt judicial holdings that forbid states to delay tender offers beyond the period required by the Williams Act, the cleverness is fairly transparent. The effect of the Indiana statute is both to impose a 50-day delay on tender offers at the option of the target firm and to make it far more difficult for tender offers to succeed even if delay is not an impediment. The offeror dare not accept the tendered shares till the stockholders' meeting is held, since if he loses the vote on voting rights he will end up with nonvoting shares and will not be able to control the corporation—the main purpose of most tender offers. So he must hold the tender offer open for 50 days, rather than the 28 days required (on average) by the SEC's regulations under the Williams Act. See 17 C.F.R. § 240.14e-1(a) (20 business days). And he can have no great confidence in being able to win the vote on voting rights, since he cannot vote his own shares. Neither can the officers and inside directors, but their aggregate shareholdings will often be small. Not filing an

acquiring-person statement is an unattractive option for the tender offeror; it exposes him to a forced redemption of his shares at a price determined under procedures chosen by a hostile management.

In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), which affirmed a decision by this court, three Supreme Court Justices opined that Illinois' takeover statute violated the supremacy clause, as we had held, see *MITE Corp. v. Dixon*, 633 F.2d 486, 490-99 (7th Cir. 1980). The Illinois statute, so far as relevant here, required an offeror who tendered for more than 5 percent of a corporation's stock to issue a statement of intentions 20 days before the offer itself could be made. This was in addition to the post-offer waiting period required by the Williams Act. The Illinois statute also required the Secretary of State of Illinois to hold a hearing on the substantive fairness of the offer during the initial 20-day period if requested by a majority of the target's outside directors, or by Illinois owners of 10 percent of the target's stock; and empowered him to disallow the offer if he found that it was substantively unfair.

Most courts have agreed that the Williams Act strikes a balance between target management and tender offeror that the states may not upset. See, e.g., *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 565-66 (6th Cir. 1982); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1128-33 (8th Cir. 1982). Even *Agency Rent-A-Car, Inc. v. Connolly*, 686 F.2d 1029, 1035-39 (1st Cir. 1982), while skeptical of the approach, concedes *some* preemptive force to the Williams Act—probably enough to preempt the Indiana statute. See *id.* at 1038-39. And CTS does not ask us to reexamine our analysis in *MITE*.

Ordinarily when Congress passes a statute punishing some supposedly unfair or unjust practice such as monopolization or misrepresentation, the states are free to add on their own penalties. See *id.* at 1037. If, therefore, the Williams Act is, as a critical literature forcefully argues, see, e.g., Fischel, *Efficient Capital Market Theory, the*

Market for Corporate Control, and the Regulation of Cash Tender Offers, 57 Tex. L. Rev. 1 (1978), an anti-takeover statute, expressing a view, however benighted, that hostile takeovers are bad, one would be hard pressed to argue that the Act forbids the states to pass fiercer anti-takeover statutes. See Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L.J. 510, 512-25 (1979). If intent can be inferred from effect, the characterization of the Williams Act as an anti-takeover statute is reinforced. See Jarrell & Bradley, *The Economic Effects of Federal and State Regulations of Cash Tender Offers*, 23 J. Law & Econ. 371 (1980). However, both we and the Supreme Court plurality in *MITE* pointed out that as the bill that ultimately became the Williams Act wended its way through the labyrinthine processes of Congress, support for hostile takeovers emerged and the original thrust of the bill was somewhat blunted. The importance of the tender offer in disciplining corporate management and shifting corporate assets into the hands of those who can manage them best was remarked, and the legislators' concern narrowed down to making sure that shareholders of target corporations would have enough information to make intelligent decisions. The bill that emerged essentially just requires the filing of a public statement of intentions and giving the shareholders enough time to digest the information in the statement as well as such counterinformation as management may care to supply. Although the ultimate balance that was struck may well incline—too far for some tastes—in favor of target management, that is not inconsistent with an inference that Congress would not have wanted the states to tip the balance any further.

Of course it is a big leap from saying that the Williams Act does not itself exhibit much hostility to tender offers to saying that it implicitly forbids states to adopt more hostile regulations, but this leap was taken by the Supreme Court plurality and us in *MITE* and by every court to consider the question since. The reasoning is that Congress in the Williams Act (as in the federal labor laws)

struck a delicate balance between the contending factions in the takeover controversy and wanted its balance to mean something and not be undone by the states. There is some support for this view in the legislative history, notably in the statement in the House Report that "The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968). Admittedly, if this sentence is read with emphasis on the first two words, it ceases to express much if any policy with regard to the permissible scope of state regulation. But whatever doubts of the Williams' Act preemptive intent we might entertain as an original matter are stilled by the weight of precedent. See, besides the other cases we have cited, *Schreiber v. Burlington Northern, Inc.*, 105 S. Ct. 2458, 2463 (1985), and *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977).

If the general approach is correct, its application to this case is straightforward. The Indiana statute upsets the balance struck by the Williams Act. Whether it does so more than the Illinois statute struck down in *MITE* is hard to say. The statutes are incommensurable. The Illinois statute both imposed delay and put the acquirer at the mercy of the Illinois Secretary of State; the Indiana statute imposes slightly greater delay but puts the acquirer at the tenderer mercies of the "disinterested" shareholders. If we had to guess we would guess that the Indiana statute is less inimical to the tender offer, but that is unimportant. The Indiana statute is a lethal dose; the fact that the Illinois statute may have been two or three lethal doses has no practical significance. Very few tender offers could run the gauntlet that Indiana has set up. In any event, if the Williams Act is to be taken as a congressional determination that a month (roughly) is enough time to force a tender offer to be kept open, 50 days is too much; and 50 days is the minimum under the Indiana act if the target corporation so chooses.

The question of the Indiana act's validity under the commerce clause may seem doubly academic: if the statute

is unenforceable by reason of the supremacy clause, it hardly matters, at least for this case, whether it is also unenforceable by reason of the commerce clause; and the commerce clause provides an independent bar to state action only when Congress has not spoken. The second point will bear elaboration. All that the commerce clause says is that Congress is empowered to regulate interstate and foreign commerce. Art. I, § 8, cl. 3. Although the clause has long been interpreted to authorize the courts to strike down state regulations of interstate commerce that conflict with the clause's presumed purpose of making the nation a common market, provided that Congress has not spoken, see, e.g., *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1852), one might think that once Congress had spoken the "dormant" commerce clause would fall out and the only judicial function would be to enforce the congressional enactment. Congress has spoken to the interstate traffic in corporate control by passing the Williams Act. If the Act is intended to limit state anti-takeover statutes, that is the authoritative expression of congressional desire, and likewise if the Act is not intended to limit them.

But there is a third possibility: that the Act is intended not to affect their legality one way or the other. In *MITE*, and in the cases that follow it, the courts have separated the supremacy and commerce clause issues—have assumed that the commerce clause retains an independent force despite the enactment of the Williams Act. We shall do the same, if only because of lingering doubt that the Act really was intended to limit state anti-takeover statutes; there is no indication that it was intended to insulate such statutes from complaints that they unduly burden interstate commerce.

The commerce clause has been interpreted to limit the power of the states to impose burdens on people living in other states. The limitation is not absolute; for example, a state may apply its health and safety regulations to imported goods even though the cost of compliance will be borne in part by people in other states, the suppliers of the goods. It is all a matter of balancing the benefit

to the state's residents against the burden to out-of-staters. In this case, as in *Edgar v. MITE Corp., supra*, 457 U.S. 640-46, where a majority of the Supreme Court held that Illinois' anti-takeover statute violated the commerce clause, the balance inclines heavily against the out-of-staters; "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981), and with specific reference to state statutes regulating takeovers, *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425, 1429-31 (10th Cir. 1983), and cases cited there, and Levmore, *Interstate Exploitation and Judicial Intervention*, 69 Va. L. Rev. 563, 619-24 (1983). We have not been told the geographical distribution of Dynamics' and CTS's shareholders but we know that CTS need have only a small fraction of its shareholders resident in Indiana to take advantage of the Indiana statute and we can assume that the vast majority of both its shareholders and Dynamics' shareholders are nonresidents. The statute gravely impairs Dynamics' ability to do business with any of CTS's shareholders. Indiana has no interest in protecting residents of Connecticut from being stampeded to tender their shares to Dynamics at $43. See *Edgar v. MITE Corp., supra*, 457 U.S. at 642-43. Unlike a state's blue sky law the Indiana statute is calculated to impede transactions between residents of other states. For the sake of trivial or even negative benefits to its residents Indiana is depriving nonresidents of the valued opportunity to accept tender offers from other nonresidents.

Whether an appreciable number of Indiana shareholders or other Indianans will benefit at all from the statute may be doubted; the only beneficiaries in this case may be the officers and directors of CTS, some of whom may not even be Indianans. No evidence has been presented that a takeover by Dynamics might reduce the value of CTS or lead to a shift of assets or employment from Indiana—and if it did lead to such a shift, this might further condemn,

rather than save, the statute. The commerce clause does not allow states to prevent corporations from moving assets and employees to other states. But whether or not an anti-takeover statute is vulnerable to challenge under the commerce clause if it impedes mobility of corporate assets, it is highly vulnerable if it impedes the important commerce in corporate control. Even if a corporation's tangible assets are immovable, the efficiency with which they are employed and the proportions in which the earnings they generate are divided between management and shareholders depends on the market for corporate control—an interstate, indeed international, market that the State of Indiana is not authorized to opt out of, as in effect it has done in this statute. See *id.* at 643.

L.P. Acquisition Co. v. Tyson, 772 F.2d 201, 205-07 (6th Cir. 1985), is distinguishable. Because the Williams Act was inapplicable to the tender offer there, the disclosures required by the state statute conferred greater benefits on local residents than the disclosure required by the Indiana statute confers, so the balance described in *Pike v. Bruce Church, Inc.* inclined more in favor of protection of local interests. In *Cardiff Acquisitions, Inc. v. Hatch*, 751 F.2d 906, 909-12 (8th Cir. 1984), the required dislosure was designed to give state residents information particularly pertinent to the impact that the takeover would have in the state itself, and the court was persuaded that the effect in discouraging takeovers through delay would be slight—as it is not here. Indiana has erected a barrier at once formidable and arbitrary to tender offers whose principal effects if they succeed will be felt outside Indiana.

The Indiana statute is not saved by the "internal affairs" doctrine. That principle of conflict of laws is designed to make sure that the law of only one state shall govern the internal affairs of a corporation or other association. See *Edgar v. MITE Corp., supra*, 457 U.S. at 645; Restatement (Second) of Conflict of Laws § 302 (1971). In this case the state is indeed Indiana; but it does not follow that any law which Indiana adopts that affects the internal affairs of Indiana corporations is thereby insulated

from review under the commerce clause. We may assume without having to decide that Indiana has a broad latitude in regulating those affairs, even when the consequence may be to make it harder to take over an Indiana corporation; an example is a law that by requiring cumulative voting for the board of directors makes it difficult to oust the entire existing board at one fell swoop. But in this case the effect on the interstate market in securities and corporate control is direct, intended, and substantial; it is not merely the incidental effect of a general regulation of internal corporate governance. The law in question is an explicit regulation of tender offers; that the mode of regulation involves jiggering with voting rights cannot take it outside the scope of judicial review under the commerce clause. Any other conclusion would invite facile evasions of the clause.

The next issue is whether the judge should have enjoined the tender offer on the ground that if it succeeded, Dynamics and CTS would be in violation of section 8 of the Clayton Act. Section 8 prohibits the director of one company from serving as the director of another if the elimination of competition between the companies, as by a merger between them, would violate any of the antitrust laws. The record of this case contains no persuasive evidence that Dynamics and CTS are in competition, but that hardly matters; the important point is that there is no reason to believe that any director of Dynamics will agree to serve as a director of CTS if by doing so he would violate section 8, which is addressed to the director and not the company. Should it wrest control of the board of CTS from the present management and should the firms be found to be in competition, Dynamics will have no difficulty in finding directors for CTS's board who are not also directors of Dynamics.

The last issue is whether the tender offer should have been enjoined because of a failure to disclose material facts. As the district judge correctly found, most of these facts were not material. One was. The tender-offer materials do not disclose Dynamics' intention to oust the present

management of CTS if the tender offer succeeds and enables Dynamics to elect a new board of directors. The district judge held that this omission was cured by the distribution to all shareholders, two weeks before the end of the tender-offer period, of Dynamics' proxy materials, in which it urges the shareholders to elect Dynamics' slate of directors. CTS argues that this was not good enough, because some shareholders may not have paid attention to the proxy solicitation. But such shareholders might have paid equally little attention to the same disclosure in the tender offer. In truth Dynamics' desire to oust the present board was broadcast loudly and widely.

Even if exclusion from the tender offer could not be cured by inclusion in the proxy materials—an arcane question of federal securities law on which CTS's briefs cast little light—it would not follow that enjoining the tender offer was a proper remedy. The fashioning of remedies is largely within the discretion of the district judge and that discretion was not abused in this case.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DYNAMICS CORPORATION OF AMERICA

Plaintiff,

v.

CTS CORPORATION, et al.

Defendants.

No. 86 C 1624

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This action for declaratory and injunctive relief was originally filed to enjoin alleged violations of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a), and

Rule 14(a) promulgated thereunder, for noncompliance with applicable SEC rules and misrepresentations in connection with the sending of proxy solicitations. Plaintiff Dynamics Corporation of America ("DCA") is a New York corporation with its principal place of business in Greenwich, Connecticut. Defendant CTS is an Indiana corporation with its principal place of business in Elkhart, Indiana. This court has jurisdiction over the matter pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and venue is proper because the defendants are found and transact business in this district.

DCA is the largest beneficial owner of common stock in CTS, owning

approximately 9.7% of CTS' outstanding common stock. Individual defendants Robert D. Hostetler, Gary B. Erekson, Joseph DiGirolamo, George F. Sommer, Gerald H. Frieling, Jr., Don J. Kacek, Ted Ross, and Richard M. Ringoen are all members of the Board of Directors of CTS. Defendants Hostetler, Erekson, and DiGirolamo are also CTS officers. In the complaint, DCA accuses defendants of engaging in an ongoing plan to entrench themselves as current management through a series of "gun-jumping" proxy solicitations.

The same day it filed this action, DCA publicly announced its intention to make a partial tender offer for 1,000,000 CTS shares, which would give it approximately a 27.7% ownership

position in CTS. DCA has indicated that it intends to use these shares to oust current management and elect its own candidates to CTS' Board of Directors at the Annual Meeting of CTS shareholders, scheduled for April 25, 1986.

DCA's tender offer predictably set off a series of defensive maneuvers by the CTS Board and a consequent expansion of the claims and controversies before this court. The sole issue before the court in this opinion is the constitutionality of the Indiana Control Shares Acquisitions Act, Indiana Code, 23-1-42 et seq., a statute which regulates the voting rights of shares acquired as a result of a tender offer or other share

acquisition which results in an ownership position exceeding 20%. This statute is part of a series of amendments to the Indiana Business Corporation Law which were signed into law on March 4, 1986, and which are to become effective August 1, 1987. IND. CODE §23-1-17-3(a). Section 23-1-17-3(b) of the statute, however, permits those corporations which so elect by resolution of the board of directors to be governed by the statute as of April 1, 1986. IND. CODE §23-1-17-3. On March 27, 1986, the CTS Board of Directors by resolution made the new Act applicable to tender offers for CTS shares as of April 1, 1986.

That same day, and before April 1, 1986, CTS filed a declaratory judgment

action in Indiana state court to have the control share acquisition provisions in IND. CODE §23-1-42 declared valid and enforceable. On March 31, 1986, DCA filed its third amended complaint to add a new Count (Count VIII) directed to the new Act and moved for injunctive relief restraining defendants from attempting to enforce the Act in Indiana state court. Defendants represented at a court hearing on April 2, 1986 before Emergency Judge Milton Shadur that they would not take any action in connection with the state court proceeding pending a ruling by this court on the statute's validity and that therefore there was nothing to enjoin. It became apparent in the course of argument, however, that on

March 31, 1986, CTS issued press releases referring to the Board's adoption of the new statute and the statute's effect on DCA's ability to vote its shares. Because those releases were arguably affecting DCA's ability to make a tender offer, the matter was scheduled for expedited ruling on a declaratory judgment motion. 28 U.S.C. §2201.

The basis of DCA's request is that the Indiana Control Shares Acquisition Act violates the Commerce Clause, Article 1, §8, cl.3, and the Supremacy Clause, Article 6, cl. 2, of the United States Constitution. In particular, DCA argues 1) that the Act directly burdens interstate commerce; 2) that the Act's indirect burden on

interstate commerce outweighs any putative local benefits; and 3) that the Act's timing provisions and procedural hurdles conflict directly with the Williams Act by favoring management and building extended delay into the process of making tender offers. CTS, in response, argues that the Act is a permissible exercise of state legislation to govern the internal affairs of a corporation and the relative voting rights of shareholders in Indiana corporations. In order to understand the nature of these challenges, a full explication of the statute is necessary.

<u>Indiana Control Shares Acquisition Act</u>

Sections 23-1-42-1 through 23-1-42-11 of the new Indiana Business

Corporation Law govern "Control Share Acquisitions," defined as the acquisition by a single entity of shares which give it more than 20 percent of the voting power with respect to shares of an "issuing public corporation." §23-1-42-1. Shares acquired within a 90 day period are considered to have been acquired in a single transaction. §23-1-42-2(b). The Act defines "issuing public corporation" as a corporation that has:

> (1) one hundred (100) or more shareholders;
>
> (2) its principal place of business, its principal office, or substantial assets within Indiana; and
>
> (3) either:
> (A) more than ten percent (10%) of its shareholders resident in Indiana;
> (B) more than ten percent (10%) of its shares owned by Indiana residents; or

(C) ten thousand (10,000) shareholders resident in Indiana.

IND. CODE §23-1-42-4(a). It is undisputed that CTS is an "issuing public corporation" within the meaning of the statute and that DCA's tender offer is a "control share acquisition" which triggers the Act's provisions.

Under the Act, shares acquired in a control share acquisition have voting rights <u>only</u> to the extent granted by resolution approved by the shareholders of the target corporation. In other words, the Act automatically strips the voting rights from such shares unless and until the shareholders resolve otherwise. In order for a tender offeror to regain

the voting rights, the resolution must be approved by:

> (1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, . . . <u>and</u>
>
> (2) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding all interested shares.

IND. CODE §23-1-42-9(b) (emphasis added). "Interested shares" are defined as shares the voting of which is controlled by an acquiring person, any officer of the corporation, and any employee of the corporation who is also a director of the corporation. §23-1-42-3.

An acquiror under the statute who seeks to avoid the above consequences

may at its election deliver an "acquiring person statement" to the issuing public corporation setting forth certain specified information. §23-1-42-6. If the acquiring person so requests at the time of delivery and undertakes to pay the corporation's expenses of a special meeting, the directors shall call a special meeting of shareholders for the purpose of considering the voting rights to be accorded the shares. If the offeror "so requests," the meeting "must not be held sooner than 30 days after receipt . . . of the acquiring person statement" and the meeting can in any event be delayed up to 50 days after receipt. Otherwise, the voting rights to be accorded the control shares "shall be presented to the next

special or annual meeting of shareholders." §23-1-42-7(a)-(d).

If an acquiror fails to file an acquiring person statement, or if the shares are subsequently not accorded full voting rights, the corporation may, to the extent authorized by its bylaws or articles of incorporation, redeem the shares at their "fair value." If the shares are accorded full voting rights and the acquiring person has acquired a majority of all voting power, the shares may not be redeemed. Upon voter resolution approving the acquisition, the other shareholders have dissenters' rights which enable them to receive the fair value of their shares. "Fair value" as used in both subsections means "a

value not less than the highest price paid per share by the acquiring person in the control share acquisition." §23-1-42-11-(a)-(c).[1]

Jurisdictional Issues

In its briefs filed before Emergency Judge Shadur opposing DCA's motions to amend its complaint and for preliminary relief regarding the Control Shares Acquisition Act, CTS

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[1]One further ramification of the statute is that, unless the CTS board presently approves DCA's acquisition of shares above 10%, CTS would be unable to engage in any business combination with DCA for a period of five years following DCA's acquisition through its tender. See IND. CODE §23-1-43 §18(a). The parties have not mentioned this provision and the court finds that in any event the validity of this provision is not presently ripe for adjudication.

argued that the anti-injunction act would bar DCA's request for relief; that this court lacks Article III jurisdiction for lack of ripeness; and that abstention under the doctrine of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1942) would be proper. Although Judge Shadur either expressly in open court or by clear implication ruled on these jurisdictional arguments when he granted DCA leave to amend its complaint, he also indicated at the hearing that CTS would be free to renew its arguments to me upon my return. Moreover, he entered no written ruling reflecting those determinations. In order to prevent any confusion on the record, the court

deems it appropriate to address those issues in this opinion.

First is CTS's argument that the anti-injunction act would bar this court from enjoining the pending state court action. 28 U.S.C. §2283. This argument is mooted for the moment at least by CTS's concession before Judge Shadur that it would take no action in the state court proceeding until this court ruled on the constitutionality of the Control Shares Acquisition Act. The anti-injunction act does not prevent this court from issuing a declaratory judgment or order requiring CTS to count at the April 25, 1986 shareholders' meeting shares that DCA had acquired in a "control share acquisition." Since DCA does not

presently seek this court to enjoin the state court lawsuit, the court does not reach the issue and will respect the concurrent jurisdiction of the Indiana state court.

Second is CTS's argument that this court lacks jurisdiction under Article III to enter a judgment at this time that the control share provisions of the Indiana Business Corporation Law are unconstitutional. First, CTS argues that DCA is not injured in fact, and that DCA has not established that injury through evidence. Second, CTS argues that the injury is in any event speculative since DCA has admitted that it would not pursue the tender offer if this court upholds CTS's "poison pill" shareholder rights

plan, the validity of which is to be ruled on next week. Both of these arguments are misguided.

The Seventh Circuit has held that a "threat of enforcement of state law" is justiciable under Article III whenever the threat presents "immediate coercive consequences" or "immediate business costs." Alcan Aluminum, Ltd. v. Department of Revenue, 724 F.2d 1284, 1287 (7th Cir. 1984); Nuclear Engineering Co. v. Scott, 660 F.2d 241, 251-52 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982). In this case, DCA has shown such "immediate business costs." Under the Williams Act time-frame, DCA has the right to purchase CTS shares tendered

to it on April 10, 1986. CTS, however, has unequivocally indicated that it will invoke state law to prevent those shares from being "voted" at the April 25, 1986 shareholders' meeting. That subsequent rulings of this court might cause DCA to withdraw its offer is beyond the point: CTS's threat of enforcing the Control Shares Act has generated uncertainty for DCA in the midst of a heated contest for corporate control. This uncertainty is not speculative nor anticipatory only, but a present fact.

CTS alternatively argues that this court should not address a constitutional issue until it decides other legal issues that may be dispositive

and may avoid the need for constitutional adjudication. Escambia County v. McMillian, 466 U.S. 48, 51 (1984). This principle of jurisprudence, however, is generally invoked in the situation where a party seeks identical relief under both statutory and constitutional grounds. In the present case, DCA has requested under its state law claim in Count VI that CTS be enjoined from enforcing a shareholders rights' plan which would seriously dilute the value of the corporation should DCA acquire over 15%. Under the constitutional claim at issue here, DCA only requests that it be assured the right to vote the shares at the April 25 meeting. The relief requested under the two counts is entirely distinct. While DCA might

withdraw its tender offer in response to other adverse rulings by this court, DCA is under no obligation to do so, and the issue is therefore not one which would be necessarily mooted by a subsequent adverse determination.

The rule adopted here is admittedly not appropriate for all cases. Congress has implicitly if not expressly determined, however, that delay is often a crucial management weapon in the context of a battle for corporate control. Edgar v. MITE Corp., 457 U.S. 624, 637 (1982). Moreover, the impending date of the shareholders' meeting and the pace of this litigation require this court, as far as is possible, to resolve non-factual matters in advance of any

evidentiary hearings. To delay a ruling in this case would unfairly tip the balance of the parties' contest for control in CTS's favor.

Finally, even were this court inclined to await ruling based on potential mootness concerns, CTS has put the constitutionality of the Act squarely in issue by embracing the Act and publicly announcing that its effect is to strip DCA of voting power acquired along with the shares. CTS's decision to issue this press release reflects its belief that the information is "material" under the test of TSC Industries, Inc. v Northway, Inc., 426 U.S. 438 (1976). Because statutes are presumed constitutional, this

court's decision to enforce or invalidate the Act under the facts in this case is obviously a "material" issue of which the shareholders also have a right to know in advance of deciding whether or not to tender shares and/or proxies. As I noted in an earlier order denying DCA certain temporary relief, the "public interest is served if shareholders know exactly where they stand when deciding whether to tender their shares. . . ." That principle will be best served in this case by a prompt ruling on the merits so as to minimize uncertainty.

CTS has argued that the uncertainty on the market is speculative and that DCA should not be entitled to redress shareholder injuries which it

has not suffered and of which there is no evidence. This argument, reasonable in the abstract, nonetheless misses the point. By informing the public of the Indiana Control Shares Act and its effect on DCA's tender, CTS has injected arguably misleading information into the marketplace which this court has the power, if not the duty, to correct. While DCA has indeed argued that market uncertainty exists without presenting evidence to support that claim, this court has relied chiefly on the harm to DCA in its decision that immediate relief is appropriate. Moreover, the materiality test of Northway is an objective one, and needn't be satisfied in every case by actual evidence of market response. In this case, the court

finds as a matter of law that the constitutionality of the Act is material, given CTS's March 31, 1986 press release, and that DCA needn't prove actual market reliance on the information to obtain relief.[2]

For similar reasons, the court rejects CTS's argument for abstention. To abstain would only delay the

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[2] In its opposition brief filed before Judge Shadur, CTS argued that DCA would suffer no irreparable harm by being forced to await this court's decision on the shareholders' rights plan before receiving a ruling on the Control Act's constitutionality. Because DCA is not presently seeking an injunction, the issue needn't be resolved at this moment. The court notes, however, that CTS's argument on irreparable harm is identical with its argument that no Article III controversy exists, and is therefore unpersuasive in any event.

proceedings and compound the potential for confusion in the market. Moreover, CTS has not made the preliminary showing necessary for this court to decline the exercise of its jurisdiction. The abstention doctrine of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1942) is intended to avoid "needless friction with state policies," id. at 500, and should be invoked only where the state statute is "fairly subject to an interpretation which will render [sic] or substantially modify the federal constitutional question." Harman v. Forssenius, 380 U.S. 528, 534-35 (1965). Abstention is not proper merely to give a state court the opportunity to rule first. Wisconsin v. Constantineau, 400 U.S. 433, 438-39

(1971). In this case, CTS has pointed to no ambiguity in the Indiana Control Shares Act the resolution of which would obviate the need for a constitutional ruling. Instead, CTS has simply suggested that an Indiana court "might" find the provisions of the statute unacceptable under the state or federal constitutions. Such vague suggestions are plainly insufficient to support a request for Pullman abstention.

Section 2403(b) Certification

Title 28, section 2403(b) of the United States Judicial Code provides that in any action in a United States court

> to which a State or any agency, officer, or employee thereof is

> not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

28 U.S.C. §2403(b). Like its federal counterpart in §2403(a), the requirement of notice and certification is not discretionary. Merrill v. Town of Addison, 763 F.2d 80, 82 (2d Cir. 1985). The cases are divided whether the obligation to certify rests with the court, id., or with the party mounting the constitutional challenge. Kealey Pharmacy & Home Care Services, Inc. v. Walgreen Co., 761 F.2d 345, 350 n.8 (7th Cir. 1985). The cases are uniform, however, in

holding that a failure to certify does not deprive the dis[t]rict court of jurisdiction. Merrill, 763 F.2d at 83; Kealey Pharmacy, 761 F.2d at 350 n.8.

The potential applicability of §2403(b) to this action was first voiced by CTS's counsel at a hearing before Emergency Judge Shadur on April 3, 1986. DCA claims it notified the Indiana attorney general that same day and supplied the attorney general with courtesy copies of relevant pleadings. The attorney general has not responded in the interim. Although DCA maintains that the question of the constitutionality of the Act does not affect the public interest because this case involves only private

parties. The court agrees but only in part. While the Indiana Control Shares Acquisitions Act may affect the public interest for purposes of §2403(b), its impact on the present situation is unique. Therefore, so long as the court confines its discussion to the application of the statute to the facts, and not the validity of the statute itself, the public interest concerns of §2403(b) are not implicated.

That the Indiana attorney general might have intervened earlier does not change this result. DCA has adequately demonstrated that a significant threat to its Williams Act rights exists so as to justify immediate relief from the statute. This harm is

immediate and ongoing, and the effects of applying the statute to this transaction are undisputed. Although DCA has denominated both its Commerce Clause and Supremacy Clause challenges as "facial" challenges to the statute's validity, the applicable cases have persuaded me that the statute's application to DCA under the present circumstances would be unconstitutional under the Supremacy Clause, even if the statute could otherwise be upheld. The court will confine its discussion to the Williams Act issues, since the Commerce Clause challenges, if reached, would have ramifications beyond the present case, and would therefore not be fairly resolved in the state's absence.

Supremacy Clause

Article VI, cl.2, of the United States Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." The issue before this court is whether the Indiana Control Share Acquisitions Act as applied in this case frustrates the congressional objectives of the Williams Act amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§78m(d)-(e); 78m(d)-(f), [sic] so as to fall within the prohibitions of the Supremacy Clause.

As explained in Edgar v. MITE Corp., 457 U.S. at 632, and in Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 22 (1977), the Williams Act was passed in response to the increased use of cash tender offers in corporate acquisitions, and to ensure that such devices would be brought within the reach of the disclosure requirements of the federal securities laws. The Act filled a previous regulatory gap by imposing several requirements. First, the Act requires that offerors must, upon commencement of the offer, file detailed information with the SEC, the public, and the target company. 15 U.S.C. §78n(d)(1). Second, the Act sets forth various timing provisions whereby offerors may close their tenders within 30 days,

subject to certain stockholder rights of withdrawal within the first 7 days of a tender and at any time after 60 days of the offer's commencement if the purchase has not been completed. 15 U.S.C. §78n(d)(5). Third, the Act has some fairness provisions to guarantee that all shares tendered must be purchased for the same price, and that excess shares must be purchased on a pro rata basis. 15 U.S.C. §78n(d)(6)-(7).

The primary purpose behind the Williams Act was to protect investors by ensuring adequate disclosure of information. Piper v. Chris-Craft, 430 U.S. at 35. See also Edgar v. MITE Corp., 457 U.S. 624, 633 (1982). As explained in Great Western United

Corp. v. Kidwell, 577 F.2d 1256, 1276 (5th Cir. 1978), rev'd on other grounds sub nom. Leroy v. Great Western United Corp., 443 U.S. 178 (1979), the function of the Act is "to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself." In other words, the goal is to promote shareholder democracy by ensuring a fully informed investing public in corporate control contests.

According to Justice White's plurality opinion in MITE, an important characteristic of the legislation under the Williams Act was "to avoid favoring either management or the

takeover bidder." 457 U.S. at 633. This policy of "evenhandedness" or "neutrality" was implicit in the evolution of the statute, when Congress replaced "avowedly pro-management" disclosure provisions with more neutral requirements which would avoid giving either side additional advantages vis-a-vis the investor in a corporate takeover contest. Id. at 633-34.

The reasons behind this shift are apparent in the legislative history. First, Congress became convinced "that takeover bids should not be discouraged because they serve a useful purpose in providing a check on entrenched but inefficient management." S.Rep.No. 550, 90th Cong., 1st

Sess., 3 (1967). Congress also did not want to deny shareholders the opportunity to sell their shares for a premium over market which results "from the competitive bidding for a block of stock of a given company." 113 Cong.Rec. 24666 (1967) (remarks of Sen. Javits). The disclosure provisions were therefore intended to strike a balance between the investor, management, and the takeover bidder by ensuring that each side would have an opportunity to express and explain its position but no more. See generally MITE, 457 U.S. at 633-34.

Whether the policy of neutrality behind the Williams Act was but a characteristic of legislation directed toward investor knowledge, or was an

affirmative regulatory goal, is in the abstract debatable. See MITE Corp. v. Dixon, 633 F.2d 486, 495 (7th Cir. 1980), aff'd sub nom. Edgar v. MITE Corp., 457 U.S. 624 (1982). In MITE, only three Justices joined Justice White's holding that the Illinois Business Take-Over Act was unconstitutional under the Supremacy Clause. While four Justices simply didn't reach the issue, Justices Powell and Stevens noted that Congress' decision to follow a policy of neutrality was not necessarily "tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management." 457 U.S. at 655 (Stevens, J., concurring); see also

457 U.S. at 646-47 (Powell, J., concurring).

Despite the above cautionary signals, the majority of courts since MITE have held that state laws which unfairly advantage incumbent management in the context of a battle for corporate control conflict with the Williams Act and are therefore invalid. See L.P. Acquisition Co. v. Tyson, 772 F.2d 201, 207-09 (6th Cir. 1985); Cardiff Acquisitions, Inc. v. Hatch, 751 F.2d 906, 912-14 (8th Cir. 1984); National City Lines v. LLC Corp., 687 F.2d 1122 (8th Cir. 1982); Icahn v. Blunt, 612 F. Supp. 1400, 1418-1420 (W.D. Mo. 1985). See also MITE Corp. v. Dixon, 633 F.2d at 495 (noting that in 1980 "most courts" had

found state takeover statutes which provide management with a powerful weapon of delay to disrupt the neutrality indispensable for proper operation of the Williams Act). This court sees no need to second-guess these cases simply because the Supreme Court as a whole did not reach the issue, particularly since CTS's counsel mostly ignores MITE in its brief. The court therefore accepts as given the proposition that state legislation which upsets the neutral balance struck by the Williams Act is invalid under the Supremacy Clause.

Justice White's opinion in MITE, like that of the Seventh Circuit below, identified three provisions of the Illinois Act that conflicted with

the Williams Act: first, the requirement of precommencement disclosure for a tender offer; second, the hearing provisions of the Act; and third, the ability of the Illinois Secretary of State to pass on the substantive fairness of a tender offer. 457 U.S. at 634-640. The Court emphasized that the precommencement notification provisions allowed the target company to disseminate information to its shareholders in advance of the offeror's ability to communicate, thereby distinctly favoring management. 457 U.S. at 635. The Court further concluded that the hearing provisions of the Act frustrated Congress' purpose by introducing extended delay into the tender offer process. Id. at 637. The Court held

that delay alone can seriously impede a tender offer and that delays beyond what the Williams Act provides would unduly favor the target company's management and thereby frustrate many pro-competitive cash tenders. Id. at 637-38.

In Icahn v. Blunt, 612 F. Supp. 1400 (W.D. Mo. 1985), the plaintiff sought injunctive and declaratory relief against the Missouri Control Share Acquisition Statute, a state law somewhat similar to the Indiana legislation at issue here. Under the Missouri statute, a tender offeror seeking to acquire over 20% of a corporation had to deliver an "acquiring person statement" to the target company, which would then have ten

days to call a special meeting of shareholders. This meeting itself was to be held no sooner than thirty and no later than fifty days from the date the statement was received. The statute then required that a purchaser could not complete the control acquisition until two-thirds of all outstanding shares and two-thirds of all outstanding shares, excluding interested shares, had voted in favor of the proposed acquisition. 612 F. Supp. at 1406-07.

The district court found that the statute conflicted with the Williams Act in at least three ways. First, the court noted that the statute expressly prevented tender offerors from commencing their offers directly

to shareholders until after obtaining the requisite supermajority approval. Second, the court found that the statute's fifty day timing provision prevented offerors from purchasing shares within the deadlines set by the Williams Act. Third, the court noted that the statute implicitly favored management by giving it control over the timing of the meeting and the form of the notice to shareholders; by making exceptions for control share acquisitions which management had approved; and by requiring two-thirds approval of all outstanding shares for control acquisitions, under which system all votes not cast would operate as votes against the potential purchaser. 612 F. Supp. at 1419-20.

Under the Indiana Control Share Act, an offeror who wishes to assure acquisition of voting rights prior to close of the tender must notify the target corporation and request a special shareholders' meeting. The timing of the meeting is left to management's discretion so long as it does not exceed 50 days. Thus, the Act allows incumbent management to delay a tender offer well beyond the 20-day timetable of the Williams Act, since the offeror who does not await such a meeting may acquire no voting rights. Indeed, the statute can be read to prohibit management from acting sooner than 30 days from receipt of the request. See §23-1-42-7(d). Finally, the Act requires that the offeror finance the expenses

of the meeting within ten days from the request.

DCA argues that to coordinate a tender offer with the Indiana Act the offeror must tip its hand by filing an acquiring person statement with the target company at least 10 and possibly as much as 30 days before announcing the tender offer, thus creating the kind of pre-offer notification struck down in MITE. The court does not interpret the statute in this manner. The offensiveness of the provision in MITE was the one-sidedness of the rules regarding precommencement communications to shareholders: only management was allowed to make such communications. In this case, the offeror can avoid any one-sidedness by

announcing its offer and holding it open for a longer period.

CTS argues that the Indiana statute, by putting the vote to "non-interested" shareholders rather than to management, fully comports with the Williams Act's policy of strict neutrality between the incumbent management and the prospective acquiror. However, the Illinois Act struck down in MITE put the decision on fairness in the hands of state officials, not management, yet the Supreme Court found management's ability to capitalize on the process for delaying purposes was itself enough to frustrate Congress' objectives. Under the Indiana statute, incumbent management has control over

the time and execution of the special shareholders' meeting. In <u>MITE</u>, the Supreme Court indicated that state laws which build extended delays into the tender offer process are themselves in conflict with federal law. 457 U.S. at 637-38. Thus, delay alone may conflict with the congressional goals since "the takeover bidder should be free to move forward within the time frame provided by Congress." <u>Id</u>. at 634. In this case, however, the delay is admittedly not indefinite, as was the case in <u>MITE</u>.

CTS' argument is secondly weak in that the Indiana Act does not wholly exclude "interested" parties from voting. The acquiring person must get not only a majority of disinterested

votes, but also a majority of each voting group entitled to vote separately. §23-1-42-9(b). The latter provision makes no exceptions for interested shares, and thus the statute would appear to operate exactly as did the Missouri statute in requiring both a majority of all shares as well as a majority of disinterested shares before allowing a control share acquisition.

Finally, "interested shares" do not exclude all members of the Board of Directors, only those directors who are also officers or employees of the corporation. §23-1-42-3. In this case, DCA apparently desires to sweep out all existing directors, a majority

of whom are outsiders and who therefore would be allowed to vote any shares they own. Thus, there is an apparent potential for interested parties being allowed to vote their shares. The parties have not presented evidence, however, as to whether the outside CTS directors have substantial or any holdings of CTS stock.

CTS also argues that the opinion in Icahn is not controlling because the Missouri statute struck down in that case directly blocked the acquisition of shares, whereas the Indiana Act governs only the acquisition of voting rights. Therefore, CTS argues that the statute no more conflicts with the Williams Act than do state

laws regulating voting rights (such as laws requiring supermajority approval for fundamental corporate changes) which also have a deterrent effect on the desirability of cash tender offers.

This argument, superficially persuasive in certain respects, is nonetheless misleading. Voting rights, after all, are an integral part of the ownership interest purchased along with a stock certificate. By limiting the rights that a tender offeror can purchase in a control acquisition, the Indiana Act deprives the transaction of all value and therefore blocks the transaction in practical terms as much as would a direct prohibition on control acquisition. Moreover, as noted in MITE in

the context of a commerce clause discussion, "[t]ender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." 457 U.S. at 645. The implications of this statement for Williams Act purposes were expressed in Icahn, where the district court found that taking the decision to buy or sell "out of the shareholder and the purchaser" and placing it "in the hands of management and other stockholders" created a direct conflict with §13 of the Williams Act. 612 F. Supp. at 1420. The Indiana statute is barely distinguishable from the Missouri statute in this regard.

CTS has also suggested that Congress last year rejected the need for federal oversight of internal corporate affairs, and that to interpret the Williams Act as governing the transfers of voting rights would do violence to Congress' intent. In 1984, a bill, H.R. 5693, was introduced in Congress that would have restricted the authority of a corporation's board of directors in adopting defensive tactics in takeover contests. The bill was scheduled for a vote by the House in August of 1984. See Annual Review of Federal Securities Regulation, 40 Bus. Law. 977, 1020 (1985). By letter of September 25, 1984, however, Secretary of the Treasury Donald Regan advised the House that the bill would intrude

unnecessarily into state law, and "constitute an unwarranted step toward imposition of a substantive federal corporation law." 16 Sec.Reg.L.Rep. No. 38 (BNA 1984). In response to the above, the bill was removed from consideration by the House. Annual Review, supra, at 1021.

From this legislative history CTS argues that Congress has implicitly decided not to usurp the states' exclusive role of regulating internal corporate affairs. The court, after careful consideration, disagrees as far as this case is concerned. Aside from the usual difficulties involved in ascertaining legislative intent from non-action, there is a serious difference between federal legislation

which would restrict the defensive tactics of corporate directors in responding to a takeover offer, and federal legislation which restricts the states from using the force of state law to ensure that corporate takeover contests rarely occur except with management's permission. Corporate directors, after all, are subject to fiduciary duties whereby shareholders can challenge their actions as being contrary to the best interests of the corporation: when state law authorizes the defensive maneuver, however, this check on managerial self-interest is absent. Thus, Congress' decision not to interfere in matters of internal corporate governance is fully consistent with a determination that states

should not unduly favor management in legislation concerning corporate acquisitions.

This court ultimately need not decide, however, whether the Indiana legislature's attempt to regulate only voting rights and not share acquisitions themselves might be permissible in other cases, nor whether the 50-day delaying provision is itself enough to find the statute in conflict with the Williams Act. In the present fact situation, application of the Indiana Control Shares Act would not merely delay DCA's attempted offer, but would clearly undo it. DCA made its tender on March 14, 1986, with the intention of closing on April 10, 1986 and being able to vote the shares along with any

received proxies two weeks later at the April 25th annual shareholders' meeting. Under the Act, however, DCA cannot vote any of the shares it acquires pursuant to the tender offer unless and until a majority of the CTS shareholders vote to extend voting rights to those shares. Because CTS only opted into the statute on March 27, 1986, thus preventing DCA from requesting a meeting sooner, DCA will be prevented from voting its shares until <u>after</u> the April 25, 1986 shareholders' meeting, at which point the shares would have lost all value to DCA.

Such a situation wholly frustrates the purpose and objective of Congress in striking a balance between the

investor, management, and the takeover bidder in takeover contest. As expressed in MITE, the Williams Act's principle of neutrality derives from congressional determination that takeover bids frequently advance shareholder welfare. 457 U.S. at 633. Under the Indiana Control Shares Act as applied to this case, however, DCA's contest for control would be over before it had begun. Such a result cannot be squared with Congress' policy. The court therefore finds that the statute is unconstitutional as applied to the facts of this case, and that DCA is entitled to declaratory relief.

Conclusion

Accordingly, DCA's motion for declaratory relief on Count VIII of the third amended complaint is granted: The Indiana Control Shares Acquisition Act may not constitutionally be applied to prevent DCA from voting any shares acquired through its tender offer at the April 25, 1986 shareholders meeting.

It is so ordered.

/s/ Susan Getzendahner
United States District Judge

April 9, 1986

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DYNAMICS CORPORATION OF AMERICA

Plaintiff,

v.

CTS CORPORATION, et al.

Defendants.

No. 86 C 1624

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

The facts underlying this action are fully set forth in this court's memorandum opinion and order of April 9, 1986, and will not be repeated here. On that date, this court held

unconstitutional as applied to this case the Indiana Control Shares Acquisition Act, a state statute which by its terms would have operated to prevent plaintiff Dynamics Corporation of America ("DCA") from voting any of the stock acquired through an ongoing tender offer for the stock of defendant CTS Corporation ("CTS"). Because the Indiana Attorney General had not been properly certified pursuant to 28 U.S.C. §2403(b), this court limited its discussion to the plaintiff's Williams Act and Supremacy Clause challenges to the statute and based its decision on the facts of this case. The Indiana Attorney General was notified of this liquidation and given copies of relevant pleadings on April 3, 1986, but he has not sought

to intervene in this action nor submitted any statement of position.

CTS has now moved to certify the April 9, 1986 opinion for immediate appeal under Fed.R.Civ.P. 54(b). The court agrees that there is no just cause for delay, but is concerned that the Court of Appeals, were it to reverse, would simply remand for resolution of the Commerce Clause issues left unresolved in the court's former opinion. Because a draft on those issues had been previously prepared, but was not issued due to §2403(b) concerns, the court has decided to rule on the alternative grounds despite the state's failure to intervene. In this way, the court intends to provide a record whereby the entire

controversy over the effectiveness of the Act can be definitively resolved on appeal. The court will also certify the appeal to the Indiana Attorney General under §2403(b) so that the state will have an opportunity to intervene before the Seventh Circuit. Cf. Merrill v. Town of Addison, 763 F.2d 80, 83 (2d Cir. 1985) (purposes of §2403(b) certification can be satisfied at appellate level).

Both the mechanics of the Indiana statute and various procedural objections voiced by defendants were thoroughly discussed in this court's previous opinion. Because the present opinion is best understood as an amendment or addition to that earlier

opinion, those discussions will not be repeated again today.

Commerce Clause

The Commerce Clause of the United States Constitution, Art. 1, §8, cl. 3, provides that "Congress shall have power . . .[t]o regulate commerce . . . among the several states." Although the clause by its terms refers to congressional power only, it has been long held that the Clause, even without implementing legislation by Congress, acts as a limitation upon state power. Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976); Freeman v. Hewitt, 329 U.S. 249, 252 (1946); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1852). A state statute which inci-

dentally regulates interstate commerce will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960). Direct regulation of interstate commerce by the states, however, is prohibited. Pike, 397 U.S. at 142; Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925).

In Edgar v. MITE Corp., 457 U.S. 624 (1982), the Supreme Court addressed the constitutionality of the Illinois Business Takeover Act. That Act contained several provisions designed to regulate tender offers for

corporations which met two of the following conditions: the corporation had its principal office in Illinois, was organized under Illinois law, or had at least 10% of its stated capital and paid-in surplus represented in Illinois. 457 U.S. at 627, 642. In such circumstances, the Act required an offeror to notify the Illinois Secretary of State of its intention to make a tender offer 20 days before the offer became effective and prevented the offeror from communicating with shareholders during that time. 457 U.S. at 635. Second, the Act permitted the Illinois Secretary of State to hold a hearing to adjudicate the substantive fairness of the tender offer, and in fact required the Secretary of State to call such a hearing

if requested to do so by persons holding 10% of the outstanding shares. Id. at 627. If the Secretary after hearing determined that the offer was unfair, he could deny registration. Id.

A plurality of the Court struck down the statute as unconstitutional under both prongs of the Commerce Clause analysis.[1] First, the Court

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[1]Justice White delivered the opinion for the Court, in which only the Chief Justice joined. Justice Blackmun joined in the opinion only on Williams Act preemption grounds; whereas Justices Stevens and O'Connor concurred in Justice White's commerce clause analysis. Justice Powell's concurrence was limited to Part V-B of the opinion. 457 U.S. at 646. That part relied on the argument that the statute's indirect burdens on interstate commerce outweighed its local benefits. Justices Marshall, Brennan, and Rehnquist dissented on mootness grounds.

held that the Illinois Act directly regulated and prevented interstate tender offers which in turn would generate interstate transactions. The Court noted that the legislation directly regulated interstate transactions, since tender offers are ordinarily communicated and consummated by means of interstate commerce nationwide, and that the Act could be applied to regulate tender offers and to prevent stock transactions which would take place wholly outside the State of Illinois. 457 U.S. at 641-42.

Second, a majority of the Court held that the burdens imposed by the Act on interstate commerce were excessive in light of the local interests the Act purported to further. 457

U.S. at 640.[2] The Court found that the statute effectively enabled the Illinois Secretary of State to block a nationwide tender offer, thereby removing the incentive that tender offers provide to ensure the efficient performance of incumbent management, and that the asserted local interests--the protection of resident security holders and the regulation of internal corporate affairs--were insufficient to outweigh those burdens given the Act's effects on nonresident shareholders and non-Illinois corporations. Id. at 643-44.

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[2]The majority votes were Justices White, Powell, O'Connor, Stevens, and the Chief Justice. See supra footnote 1.

Two district courts have applied the holding of MITE to find other control shares acquisition acts unconstitutional under the Commerce Clause. In APL Limited Partnership v. Van Dusen, Inc., 622 F.Supp. 1216 (D. Minn. 1985), the district court found the Minnesota Control Share Acquisition Act to pose an unreasonable burden on interstate commerce. That statute regulated tender offers for shares in corporations organized under Minnesota law with either their principal place of business of $1,000,000 in assets within the state. The statute required acquirors to disclose certain information to shareholders of the target corporation and permitted the shareholders to block the acquisition through a stockholders vote. The

court found the putative local benefits insufficient to outweigh the severe effects on nonresident stockholders who might wish to tender their shares for a premium.

In Icahn v. Blunt, 612 F.Supp. 1400 (W.D. Mo. 1985), the court found the Missouri Control Share Acquisition Statute, which like the Minnesota statute gave the shareholders power to block a 20% acquisition, an impermissible attempt to assert extraterritorial jurisdiction over nonresident persons and property. The court stressed that the statute was applicable to foreign corporations, was not limited in effect to in-state shareholders, and was therefore a direct regulation of interstate commerce.

The court also found that the statute was unconstitutional under the balancing test of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) since the burden imposed on interstate commerce was excessive in relation to the local interests served.

Whether IND. CODE §23-1-42 directly burdens interstate commerce.

DCA argues that the Indiana Control Shares Acquisition Act directly regulates interstate commerce in the following ways:

> (1) it permits target company management to strip the voting rights from shares acquired in out-of-state transactions;

> (2) it can be invoked by the management of out-of-state companies;
>
> (3) it permits target company management to effectively block successful interstate tender offers.

CTS, in contrast, argues that the statute does not directly regulate tender offers but merely governs the internal relations between existing shareholders once the shares have been acquired. Therefore, CTS argues that the statute is no different from other voting-rights provisions, such as supermajority requirements or cumulative voting, which govern internal corporate affairs.

There is a superficial persuasiveness to CTS's argument. Unlike the statutes in APL and Icahn, the Indiana Control Shares Acquisition Act does not give shareholders the power to block control acquisitions altogether, but only gives power to block the acquisition of voting rights in connection with those shares. Indeed, the APL court, in holding that the acquisition of shares does not implicate internal corporate matters, expressly distinguished state regulations over the exercise of power resulting from an acquisition. 622 F.Supp. at 1223-24. Therefore, CTS argues that the effect on interstate commerce is incidental at best, and that the statute no more deters purchases of stock in Indiana corporations than do laws requiring supermajority shareholder approvals for fundamental corporate changes.

As I noted in my April 9, 1986 opinion, however, this argument ignores the basic fact that voting rights are an integral part of the ownership interest purchased along with a stock certificate. See Mem. Op. & Order at 23. By limiting the rights that a tender offeror can purchase in a control acquisition, the Indiana statute deters tender offers and thereby burdens interstate commerce as much as if the statute blocked the transaction altogether. The statute does not govern the exercise of control share voting power, but prevents the power from ever be-

coming acquired except upon specified events. Moreover, by providing for automatic redemption privileges when offerors fail to file an acquiring person statement in advance of purchase, the Act further regulates interstate tender offers. Indiana cannot recast regulation of tender offers as internal corporate governance by allowing the transaction to go forward but depriving it of value. In either event, the statute undeniably "regulates" interstate commerce by restricting the sale and purchase of stock in interstate transactions.

Moreover, the Act appears by its express terms not to be limited to Indiana corporations. An "issuing public corporation" need only have

"substantial assets" in Indiana and 10,000 resident Indiana shareholders for the statute to apply. IND. CODE §23-1-42-4(a). While the statute generally defines "corporation" as a "corporation for profit that is not a foreign corporation, incorporated under or subject to provisions of this article," §23-1-20-5, the statute is also intended by its general terms to apply to "all foreign corporations that want to transact business in Indiana" after July 31, 1987. §23-1-17-4. Thus, foreign corporations which have up to 90% of their shares owned by non-Indiana residents or which have up to 90% of their shareholders residing elsewhere would be "under or subject to provisions of this article" for purposes of §23-1-

20-5 so long as they transact business in Indiana. As noted in MITE, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside the state's borders. 457 U.S. at 642-43. Because the Indiana Control Shares Acquisition Act can be used to regulate stock transactions between non-Indiana residents and a non-Indiana acquiror, it presents the same constitutional infirmities which caused the Supreme Court to strike down the Illinois Takeover statute in MITE.

The statute's application to non-resident corporations is not without some ambiguity. Until August 1, 1987, the Act does not apply to domestic corporations unless their board of

directors adopts a resolution electing to be governed by the statute. §23-1-17-3(b). Since the statute does not give foreign corporations this option, it is possible, by negative implication, to read the statute as not governing foreign corporations for the time being. While such a reading is unlikely, given the specific definition of "issuing public corporation," the court addresses this possibility.

Assuming, arguendo, that the Act applies only to Indiana corporations up till August 1, 1987, this alone might not save the statute from constitutional infirmity. First, the statutory mandate to regulate out-of-state corporations as of August 1, 1987 is clear; the court seriously

doubts that any postponements of that power can be used to disguise the nature of the legislature's true intent, or to recharacterize the statute's effects. Second, even were the statute limited to Indiana corporations, by operation it directly interferes with transactions between nonresident shareholders in an Indiana corporation and non-Indiana offerors. As noted in APL, "regulation of shareholders -- and those who would become shareholders -- is not the same as regulating the corporation itself." 622 F. Supp. at 1223 (emphasis in original). Because the issue is arguable, because the court has not heard from the Indiana Attorney General, and because MITE's "direct regulation" holding commanded only a plurality of

Supreme Court Justices, the court examines whether the putative local benefits of the statute outweigh its burden on interstate commerce.

Whether the burden of IND. CODE §23-1-42 on Interstate Commerce Outweighs its Local Benefits.

DCA argues that even if the Indiana Control Shares Acquisition Act does not directly burden interstate commerce, its indirect burdens far outweigh any local benefits. The parties agree that the applicable test for determining this question is that set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

> upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be prompted as well with a lesser impact on interstate activities.

As emphasized in Edgar v. MITE Corp., 457 U.S. 624 (1982), moreover, the mere articulation of a legitimate local interest cannot alone justify a burden on interstate commerce: rather, the court must question whether the interest will in fact be furthered by the statute. Therefore, the test is more appropriately characterized as weighing local benefits rather than local interests against interstate burdens. See APL, 622 F.Supp. at 1221.

With this teaching in mind, it is necessary to examine the local interests behind the Indiana Control Shares Acquisition Act. This task is rendered somewhat difficult by the fact that there is no legislative history before the court, and the statute nowhere articulates the local interests it purports to serve. CTS chiefly argues that the Act simply regulates the relations between existing shareholders and that the state legislature intended to fulfill its traditional duty of regulating corporations in a manner that promotes fair treatment of all shareholders and shareholder control over fundamental corporate events.

The court agrees that Indiana has a legitimate right to govern the internal affairs of its corporations. In MITE, however, the Supreme Court noted that internal corporate governance was an inadequate justification for burdening interstate commerce when the statute in question applied to nonresident as well as resident corporations. 457 U.S. at 645. Here, the Indiana statute by its terms applies not only to Indiana corporations but to corporations with "substantial assets" in Indiana and for which only 10% of the outstanding shares or 10,000 shares (whichever is smaller) are owned by Indiana residents. The statute is thus clearly overbroad in relation to the putative local interest of internal corporate regulation.

Moreover, the application of the statute to nonresident corporations, as in MITE, makes CTS's "proposed . . . justification somewhat incredible." Id.

Second, it is questionable in any event whether internal corporate governance can be legitimately invoked to justify regulation of stock transactions. As noted in MITE, "[t]ender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company." 457 U.S. at 645. Accord, APL, 622 F.Supp. at 1223 (distinguishing regulation of shareholders from regulating the corporation itself). CTS nonetheless argues that the Indiana Act

avoids this problem by regulating only the acquisition of voting power, and not the acquisition of the shares themselves.

As I noted earlier, the distinction between acquisition of shares and acquisition of votes is deceptive. The value of the shares in control acquisitions is inseparable from their voting power, and Indiana should not be allowed to burden interstate tender offers by vetoing voting power any more than it should be allowed to give shareholders veto power over the acquisition itself. Thus, while a state may legitimately regulate the exercise of corporate power once control shares have been acquired, it may not prevent the acquisition of power through out-

of-state transactions simply because local interests are affected.

CTS places particular reliance on the passage of APL which distinguishes between the acquisition of shares and the exercise of power as a result of that acquisition: "The acquisition of shares does not implicate the internal affairs of the target corporation. The use of that power once the shares have been acquired may well be a proper subject of state regulation, but that is not what the MCSAA regulates." 622 F.Supp. at 1223-24 (emphasis in original). CTS maintains that because the Indiana Act regulates the post-acquisition power of control shares and not their purchase, the

statute falls on the other side of the distinction drawn in APL.

The court disagrees. The passage in APL appears to distinguish between rules which regulate the power majority shareholders enjoy over minority shareholders on the one hand and rules which regulate the transferring of shares and of power on the other. The Indiana Business Corporation Law already contains provisions which impose fiduciary duties on majority or controlling stockholders. Thus, it is difficult to see what rational basis is served by directly regulating the transfer of power. Indeed, the statute does not require shareholder approval for the transfer of voting power from one majority group to

another, §23-1-42-2(e), even though the same fiduciary concerns would presumably be triggered. This too undercuts the purported state interest articulated by CTS.

In sum, the Indiana Act, by stripping away voting power from new control shares until the majority of "disinterested" shareholders subsequently approves, significantly interferes with the interstate market for corporate control and limits the rights which can be transferred in that market. That interference cannot be justified on the grounds of local interests which are not even-handedly served by the statute and which are apparently protected elsewhere under Indiana law.

Although CTS does not advance the argument, there are two other conceivable state interests behind the Control Shares Acquisition Act. First is the state's concern in protecting local shareholders. Some such concern can be evidenced from the Act's requirement that issuing public corporations have specified numbers or percentages of Indiana shareholders in order to fall within the Act's provisions. The statute appears not to be limited in its effects to Indiana shareholders, however, in contrast to the antitakeover statutes which passed constitutional muster in <u>L.P. Acquisition Co. v. Tyson</u>, 772 F.2d 201 (6th Cir. 1985) and <u>Cardiff Acquisitions, Inc. v. Hatch</u>, 751 F.2d 906 (8th Cir. 1984). Because Indiana has "no legi-

timate interest in protecting nonresident shareholders," there is "nothing to be weighed in the balance" to sustain the law as it applies to transactions solely between non-Indiana residents. <u>See</u> <u>MITE</u>, 457 U.S. at 644; <u>APL</u>, 622 F.Supp. at 1222; <u>Icahn</u>, 612 F.Supp. at 1417.

In <u>MITE</u>, <u>Icahn</u>, and <u>APL</u>, the statutes in question applied to corporations even though there were <u>no</u> resident shareholders. CTS might therefore argue that the Indiana Control Shares Act is distinguishable because of the substantial number of Indiana shareholders who must be affected before the statute operates. The problem with this argument is that the statute's 10% or 10,000 floor still

allows for substantial interference in a transaction where up to 90% of the affected shareholders reside outside Indiana. As noted in <u>Pike v. Bruce Church</u>, the extent of a permissible burden on interstate commerce depends not only on the nature of the local interest involved, but on whether that interest "could be protected as well with a lesser impact on interstate activity." 397 U.S. at 142. Because Indiana could achieve its goal of protecting in-state shareholders without regulating transactions solely between non-residents, the Act's effect on interstate commerce exceeds the scope reasonably necessary for protecting Indiana residents.

Even if the Indiana Act were construed to be limited to in-state shareholders, substantial questions would remain whether the benefits to local shareholders actually outweighed the burden on commerce. In <u>MITE</u>, the Supreme Court concluded that the benefit to Illinois shareholders from increased disclosure burdens was "for the most part speculative" where the Act increased the risk that an interstate tender offer would fail due to defensive tactics employed by incumbent management. <u>Id</u>. at 645. In this case, the concern for shareholder welfare presents similar problems, since the Act protects shareholders only at the expense of deterring tender offers. Since other state laws already protect shareholders against

majority shareholder misconduct, and since both state and federal laws leave corporate boards free to take reasonable defensive measures against takeovers when in the best interest of the shareholders, the need for added protection against control acquisitions is indeed somewhat speculative. The court does not rely on this analysis, however, since the Act's extension to nonresident shareholders is clear.

A final state goal possibly served by the Control Shares Acquisition Act would be Indiana's interest in protecting its business climate. CTS does not advance this argument, however, and the court finds the argument weak for the reasons set forth in APL

and Icahn. In those cases, Minnesota and Missouri, respectively, argued that they had a legitimate interest in protecting corporations which do significant business in-state from acquisitions which might disrupt that business. The Courts found such an argument to be based on the unsubstantiated assumption that a person who acquires 20% of a local corporation's voting stock is likely to harm the state's business climate. The Courts further found the arguments weak in that neither state had attempted to restrain incumbent management from taking actions which might adversely affect the state business climate. See APL, 622 F.Supp. at 1223; Icahn, 612 F.Supp. at 1417. Both of those

arguments are fully applicable to the present case.

In sum, then, the court finds that the substantial interference with interstate commerce created by the Indiana Control Shares Acquisition Act outweighs the articulated local benefits so as to create an impermissible indirect burden on interstate commerce.

Conclus on

The court amends its April 9, 1986 opinion to add additional grounds for granting judgment to the plaintiff on Count VIII of its third amended complaint, and, finding no just cause for delay, certifies the judgment for immediate appeal under Fed.R.Civ.P. 54(b). The court also certifies the

appeal under 28 U.S.C. §2403(b) to the Indiana Attorney General for purposes of intervention. Plaintiff DCA, as the party raising the constitutional challenges, is charged with the responsibility of today notifying the appropriate state officials of this court's judgment and the appeal.

It is so ordered.

/s/Susan Getzendanner
United States District Judge

April 16, 1986

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Decided April 23, 1986.

Before

Hon. William J. Bauer, Circuit Judge

Hon. Richard D. Cudahy, Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Nos. 86-1601, 86-1608

DYNAMICS CORPORATION OF AMERICA, Plaintiff-Appellee, Counterdefendant-Appellee,	)
v.	)
CTS CORPORATION, Defendant-Appellant, Counterplaintiff-Appellant,	)
STATE OF INDIANA, Intervenor-Appellant.*	)

*Caption omits individual defendants-appellants and individual counter-defendants-appellees.

Appeals from the United States
District Court for the
Northern District of Illinois,
Eastern Division.

No. 86 C 1624

Susan Getzendanner, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this case appealed from be, and the same is hereby, AFFIRMED, with

costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Argued April 23, 1986

Unpublished Order Not To Be

Cited Per Circuit Rule 35

Decided April 23, 1986.

Before

Hon. William J. Bauer, Circuit Judge

Hon. Richard D. Cudahy, Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Nos. 86-1601, 86-1608

DYNAMICS CORPORATION OF AMERICA,)
Plaintiff-Appellee,)
Counterdefendant-Appellee,)
)
v.)
)
CTS CORPORATION,)
Defendant-Appellant,)
Counterplaintiff-Appellant.)
)

STATE OF INDIANA,)
Intervenor-Appellant.*)

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 86 C 1624

Susan Getzendanner, Judge

ORDER

This is an appeal under 28 U.S.C. § 1291(a)(1) by CTS Corporation and three of its directors, and by the Attorney General of Indiana, from a series of orders by Judge Getzendanner of the Northern District of Illinois granting Dynamics Corporation of America a preliminary injunction against the enforcement of CTS's

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* Caption omits individual defendants-appellants and individual counterdefendants-appellees.

shareholders' rights ("poison pill") plan, declaring the Indiana Control Share Acquisitions Act unconstitutional under the supremacy and commerce clauses, and refusing to enjoin Dynamics' tender offer for a potentially controlling interest in CTS. The orders were issued between April 9 and 16. We accelerated the briefing and argument of the appeal because Dynamics must decide by close of business tomorrow (April 24) whether to buy the shares that have been tendered, a decision that may be materially affected by the validity of the shareholders' rights plan and of the Indiana statute.

Having now heard argument and conferred on the appeal, we have

decided that Judge Getzendanner's orders should be, and they hereby are, affirmed. We shall issue an opinion in due course explaining the grounds of our decision.

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 86-1601

DYNAMICS CORPORATION OF AMERICA, Plaintiff-Appellee,	)
v.	)
CTS CORPORATION, et al., Defendant-Appellants,	)
STATE OF INDIANA, Intervenor-Appellant.	)

Appeal from the United States
District Court for the
Northern District of Illinois,
Eastern Division.

No. 86 C 1624

The Honorable
Susan Getzendanner, Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that

defendant-appellant CTS Corporation hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 23, 1986. The appeal is from the judgment holding unconstitutional the Indiana Control Share Acquisition Chapter, IND. CODE § 23-1-42-1, et seq.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

/s/James A. Strain
of

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1313 Merchants Bank Building
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Telephone: (317) 638-1313

Attorney for defendant-appellant CTS Corporation

[Filed: July 16, 1986]

PROOF OF SERVICE

I, James A. Strain, a member of the Bar of the Supreme Court of the United States, hereby certify pursuant to Rules 10 and 28 of the Supreme Court of the United States that on this 15th day of July, 1986, I served copies of the foregoing "Notice Of Appeal To The Supreme Court Of The United States" by depositing copies in the United States mail, first-class postage prepaid, addressed to

Lowell Sachnoff, Esq.
Sachnoff, Weaver & Rubenstein, Ltd.
30 South Wacker Drive
Chicago, IL 60606

Thomas A. Withrow
Henderson, Daily, Withrow & DeVoe
One Indiana Square
Indianapolis, IN 46204

Linley E. Pearson
Attorney General of Indiana
Arthur Thaddeus Perry
Deputy Attorney General
Office of the Attorney General
219 State House
Indianapolis, IN 46204

/s/James A. Strain

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

DYNAMICS CORPORATION OF AMERICA)
)
v.)
)
CTS CORPORATION, et al)

CASE NUMBER: [86-C-1624]

/____/ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

/ XX / Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment on Count VIII is entered in favor of the plaintiff and against the defendants. There being no just reason for delay, the Court certifies the judgment for immediate appeal under Fed.R.Civ. 54(b). Enter judgment.

April 16, 1986
Date

H. STUART CUNNINGHAM
Clerk

/s/Barbara J. Brotherson
(By) Deputy Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Commerce Clause, U.S. Const. art. I, §8, cl. 3, provides:

> The Congress shall have power to regulate commerce with foreign nations, and among the several states.

2. The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States,

> shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

3. The Williams Act Amendments to the Securities Exchange Act of 1934, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f), as amended, provide:

> (d) Reports by persons acquiring more than five per centum of certain classes of securities
>
> (1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered

pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*], is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and

such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors--

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or

is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the

securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the state-

ments to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their

acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to--

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the

Securities Act of 1933 [15 U.S.C. 77a et seq.];

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall

exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) Purchase of securities by issuer

(1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 78l of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], to purchase any equity security issued by it if such purchase

is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of

investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or

inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to paragraph (1) of this subsection, the person making the filing shall pay to the Commission a fee of 1/50 of 1 per centum of the value of securities proposed to be purchased. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to any securities issued in connection with the proposed transaction under section

77f(b) of this title, or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this paragraph.

15 U.S.C. § 78m(d)-(e).

(d) <u>Tender offer by owner of more than five per centum of class of securities; exceptions</u>

(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any

class of any equity security which is registered pursuant to section 78l of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78l(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such

of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may

by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer,

such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the

Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public

interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to

securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such

person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security--

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) Untrue statement of material fact or omission of fact with respect to tender offer

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light

of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) Election or designation of majority of directors of issuer by owner of more than five per centum

of class of securities at other than meeting of security holders

If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 78m of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission,

and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

4. Chapter 42 (entitled "Control Share Acquisitions") of the Indiana Business Corporation Law, IND. CODE ANN. §§ 23-1-42-1 to -11 (Burns Cum. Supp. 1986), provides:

23-1-42-1. "Control shares" defined. -- As used in this chapter,

"control shares" means shares that, except for this chapter, would have voting power with respect to shares of an issuing public corporation that, when added to all other shares of the issuing public corporation owned by a person or in respect to which that person may exercise or direct the exercise of voting power, would entitle that person, immediately after acquisition of the shares (directly or indirectly, alone or as a part of a group), to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of voting power:

(1) One-fifth (1/5) or more but less than one-third (1/3) of all voting power.

(2) One-third (1/3) or more but less than a majority of all voting power.

(3) A majority or more of all voting power.

23-1-42-2. "Control share acquisition" defined. -- (a) As used in this chapter, "control share acquisition" means the acquisition (directly or indirectly) by any person of ownership of, or the power to direct the exercise of voting power with respect to, issued and outstanding control shares.

(b) For purposes of this section, shares acquired within ninety (90) days or shares acquired pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition.

(c) For purposes of this section, a person who acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing this chapter has voting power only of shares in respect of which that person would be able to exercise or direct the exercise of votes without further instruction from others.

(d) The acquisition of any shares of an issuing public corporation does

not constitute a control share acquisition if the acquisition is consummated in any of the following circumstances:

(1) Before January 8, 1986.

(2) Pursuant to a contract existing before January 8, 1986.

(3) Pursuant to the laws of descent and distribution.

(4) Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this chapter.

(5) Pursuant to a merger or plan of share exchange effected in compliance with IC 23-1-40 if the issuing public corporation is a party to the agreement of merger or plan of share exchange.

(e) The acquisition of shares of an issuing public corporation in good faith and not for the purpose of circumventing this chapter by or from:

(1) Any person whose voting rights had previously been authorized by shareholders in compliance with this chapter; or

(2) Any person whose previous acquisition of shares of an issuing public corporation would

have constituted a control share acquisition but for subsection (d);

does not constitute a control share acquisition, unless the acquisition entitles any person (directly or indirectly, alone or as a part of a group) to exercise or direct the exercise of voting power of the corporation in the election of directors in excess of the range of the voting power otherwise authorized.

<u>23-1-42.3</u>. <u>"Interested shares" defined</u>. -- As used in this chapter, "interested shares" means the shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise of the voting power of the

corporation in the election of directors:

(1) An acquiring person or member of a group with respect to a control share acquisition.

(2) Any officer of the issuing public corporation.

(3) Any employee of the issuing public corporation who is also a director of the corporation.

<u>23-1-42-4</u>. <u>"Issuing public corporation" defined</u>. -- (a) As used in this chapter, "issuing public corporation" means a corporation that has:

(1) One hundred (100) or more shareholders;

(2) Its principal place of business, its principal office, or substantial assets within Indiana; and

(3) Either:

(A) More than ten percent (10%) of its shareholders resident in Indiana;

(B) More than ten percent (10%) of its shares owned by Indiana residents; or

(C) Ten thousand (10,000) shareholders resident in Indiana.

(b) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

(c) Shares held by banks (except as trustee or guardian), brokers or nominees shall be disregarded for purposes of calculating the percentages or numbers described in this section.

<u>23-1-42-5</u>. <u>Law applicable to control share voting rights</u>. -- Unless the corporation's articles of incorporation or bylaws provide that this

chapter does not apply to control share acquisitions of shares of the corporation before the control share acquisition, control shares of an issuing public corporation acquired in a control share acquisition have only such voting rights as are conferred by section 9 [23-1-42-9] of this chapter.

<u>23-1-42-6</u>. <u>Notice of control share acquisition</u>. -- Any person who proposes to make or has made a control share acquisition may at the person's election deliver an acquiring person statement to the issuing public corporation at the issuing public corporation's principal office. The acquiring person statement must set forth all of the following:

(1) The identity of the acquiring person and each other member of any group of which the person is a part for purposes of determining control shares.

(2) A statement that the acquiring person statement is given pursuant to this chapter.

(3) The number of shares of the issuing public corporation owned (directly or indirectly) by the acquiring person and each other member of the group.

(4) The range of voting power under which the control share acquisition falls or would, if consummated, fall.

(5) If the control share acquisition has not taken place:

(A) A description in reasonable detail of the terms of the proposed control share acquisition; and

(B) Representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.

23-1-42-7. Shareholder meeting to determine control share voting rights. -- (a) If the acquiring person so requests at the time of delivery of an acquiring person statement and gives an undertaking to pay the corporation's expenses of a special meeting, within ten (10) days thereafter, the directors of the issuing public corporation shall call a special meeting of shareholders of the issuing public corporation for the purpose of considering the voting rights to be accorded the shares acquired or to be acquired in the control share acquisition.

(b) Unless the acquiring person agrees in writing to another date, the special meeting of shareholders shall

be held within fifty (50) days after receipt by the issuing public corporation of the request.

(c) If no request is made, the voting rights to be accorded the shares acquired in the control share acquisition shall be presented to the next special or annual meeting of shareholders.

(d) If the acquiring person so requests in writing at the time of delivery of the acquiring person statement, the special meeting must not be held sooner than thirty (30) days after receipt by the issuing public corporation of the acquiring person statement.

23-1-42-8. Notice of shareholder meeting. -- (a) If a special meeting is requested, notice of the special meeting of shareholders shall be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for the meeting, whether or not entitled to vote at the meeting.

(b) Notice of the special or annual shareholder meeting at which the voting rights are to be considered must include or be accompanied by both of the following:

(1) A copy of the acquiring person statement delivered to the

issuing public corporation pursuant to this chapter.

(2) A statement by the board of directors of the corporation, authorized by its directors, of its position or recommendation, or that it is taking no position or making no recommendation, with respect to the proposed control share acquisition.

23-1-42-9. Resolution granting control share voting rights. -- (a) Control shares acquired in a control share acquisition have the same voting rights as were accorded the shares before the control share acquisition only to the extent granted by resolu-

tion approved by the shareholders of the issuing public corporation.

(b) To be approved under this section, the resolution must be approved by:

(1) Each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition would, if fully carried out, result in any of the changes described in IC 23-1-38-4(a); and

(2) Each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding all interested shares.

<u>23-1-42-10</u>. <u>Redemption of control shares</u>. -- (a) If authorized in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, control shares acquired in a control share acquisition with respect to which no acquiring person statement has been filed with the issuing public corporation may, at any time during the period ending sixty (60) days after the last acquisition of control shares by the acquiring person, be subject to redemption by the corporation at the

fair value thereof pursuant to the procedures adopted by the corporation.

(b) Control shares acquired in a control share acquisition are not subject to redemption after an acquiring person statement has been filed unless the shares are not accorded full voting rights by the shareholders as provided in section 9 [23-1-42-9] of this chapter.

<u>23-1-42-11</u>. <u>Rights of dissenting shareholders</u>. -- (a) Unless otherwise provided in a corporation's articles of incorporation or bylaws before a control share acquisition has occurred, in the event control shares acquired in a control share acquisition are accorded full voting rights

and the acquiring person has acquired control shares with a majority or more of all voting power, all shareholders of the issuing public corporation have dissenters' rights as provided in this chapter.

(b) As soon as practicable after such events have occurred, the board of directors shall cause a notice to be sent to all shareholders of the corporation advising them of the facts and that they have dissenters' rights to receive the fair value of their shares pursuant to IC 23-1-44.

(c) As used in this section, "fair value" means a value not less than the highest price paid per share

by the acquiring person in the control share acquisition.